

# YEARBOOK

Volume XLV: 2014





**UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW**

**YEARBOOK**

**Volume XLV: 2014**



**UNITED NATIONS  
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## NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The footnote numbering follows that used in the original documents on which this *Yearbook* is based. Any footnotes added subsequently are indicated by lower-case letters.

Changes of and additions to wording that appeared in earlier drafts of conventions, model laws and other legal texts are in italics, except in the case of headings to articles, which are in italics as a matter of style.

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## INTRODUCTION

This is the forty-fifth volume in the series of *Yearbooks* of the United Nations Commission on International Trade Law (UNCITRAL).<sup>1</sup>

The present volume consists of three parts. Part one contains the Commission's report on the work of its forty-seventh session, which was held in New York, from 7-18 July 2014, and the action thereon by the United Nations Conference on Trade and Development (UNCTAD) and by the General Assembly.

In part two, most of the documents considered at the forty-seventh session of the Commission are reproduced. These documents include reports of the Commission's Working Groups as well as studies, reports and notes by the Secretary-General and the Secretariat. Also included in this part are selected working papers that were prepared for the Working Groups.

Part three contains summary records, the bibliography of recent writings related to the Commission's work, a list of documents before the forty-seventh session and a list of documents relating to the work of the Commission reproduced in the previous volumes of the *Yearbook*.

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<sup>1</sup> To date, the following volumes of the *Yearbook of the United Nations Commission on International Trade Law* (abbreviated herein as *Yearbook* [year]) have been published:

<i>Volume</i>	<i>Years covered</i>	<i>United Nations publication Sales No. or document symbol</i>
I	1968-1970	E.71.V.1
II	1971	E.72.V.4
III	1972	E.73.V.6
III Suppl.	1972	E.73.V.9
IV	1973	E.74.V.3
V	1974	E.75.V.2
VI	1975	E.76.V.5
VII	1976	E.77.V.1
VIII	1977	E.78.V.7
IX	1978	E.80.V.8
X	1979	E.81.V.2
XI	1980	E.81.V.8
XII	1981	E.82.V.6
XIII	1982	E.84.V.5
XIV	1983	E.85.V.3
XV	1984	E.86.V.2
XVI	1985	E.87.V.4
XVII	1986	E.88.V.4
XVIII	1987	E.89.V.4
XIX	1988	E.89.V.8
XX	1989	E.90.V.9
XXI	1990	E.91.V.6
XXII	1991	E.93.V.2
XXIII	1992	E.94.V.7
XXIV	1993	E.94.V.16



<i>Volume</i>	<i>Years covered</i>	<i>United Nations publication Sales No. or document symbol</i>
XXV	1994	E.95.V.20
XXVI	1995	E.96.V.8
XXVII	1996	E.98.V.7
XXVIII	1997	E.99.V.6
XXIX	1998	E.99.V.12
XXX	1999	E.00.V.9
XXXI	2000	E.02.V.3
XXXII	2001	E.04.V.4
XXXIII	2002	E.05.V.13
XXXIV	2003	E.06.V.14
XXXV	2004	E.08.V.8
XXXVI	2005	E.10.V.4
XXXVII	2006	A/CN.9/SER.A/2006
XXXVIII	2007	A/CN.9/SER.A/2007
XXXIX	2008	A/CN.9/SER.A/2008
XL	2009	A/CN.9/SER.A/2009
XLI	2010	A/CN.9/SER.A/2010
XLII	2011	A/CN.9/SER.A/2011
XLIII	2012	A/CN.9/SER.A/2012
XLIV	2013	A/CN.9/SER.A/2013



*Part One*

REPORT OF THE COMMISSION  
ON ITS ANNUAL SESSION  
AND COMMENTS AND ACTION THEREON



# THE FORTY-SEVENTH SESSION (2014)

## A. Report of the United Nations Commission on International Trade Law, forty-seventh session

(New York, 7-18 July 2014) (A/69/17)

[Original: English]

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## I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the forty-seventh session of the Commission, held in New York from 7 to 18 July 2014.
2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

## II. Organization of the session

### A. Opening of the session

3. The forty-seventh session of the Commission was opened by the Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, Mr. Serpa Soares, on 7 July 2014.

### B. Membership and attendance

4. The General Assembly, in its resolution 2205 (XXI), established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973, the Assembly increased the membership of the Commission from 29 to 36 States. By its resolution 57/20 of 19 November 2002, the General Assembly further increased the membership of the Commission from 36 States to 60 States. The current members of the Commission, elected on 3 November 2009, on 15 April 2010, on 14 November 2012 and on 14 December 2012 are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated: Algeria (2016), Argentina (2016), Armenia (2019), Australia (2016), Austria (2016), Belarus (2016), Botswana (2016), Brazil (2016), Bulgaria (2019), Cameroon (2019), Canada (2019), China (2019), Côte d'Ivoire (2019), Colombia (2016), Croatia (2016), Denmark (2019), Ecuador (2019), El Salvador (2019), Fiji (2016), France (2019), Gabon (2016), Georgia (2015), Germany (2019), Greece (2019), Honduras (2019), Hungary (2019), India (2016), Indonesia (2019), Iran (Islamic Republic of) (2016), Israel (2016), Italy (2016), Japan (2019), Jordan (2016), Kenya (2016), Kuwait (2019), Liberia (2019), Malaysia (2019), Mauritania (2019), Mauritius (2016), Mexico (2019), Namibia (2019), Nigeria (2016), Pakistan (2016), Panama (2019), Paraguay (2016), Philippines (2016), Poland (2016), Republic of Korea (2019), Russian Federation (2019), Sierra Leone (2019), Singapore (2019), Spain (2016), Switzerland (2019), Thailand (2016), Turkey (2016), Uganda (2016), United Kingdom of Great Britain and Northern Ireland (2019), United States of America (2016), Venezuela (Bolivarian Republic of) (2016) and Zambia (2019).
5. With the exception of Botswana, Côte d'Ivoire, Fiji, Gabon, Indonesia, Jordan, Malaysia, Mauritania and Sierra Leone, all the members of the Commission were represented at the session.
6. The session was attended by observers from the following States: Belgium, Chile, Cyprus, Czech Republic, Democratic Republic of the Congo, Finland, Guatemala, Libya, Netherlands, Norway, Peru, Qatar, Romania, Slovakia, Sweden and Viet Nam.
7. The session was also attended by observers from Holy See, the State of Palestine and the European Union.
8. The session was also attended by observers from the following international organizations:
  - (a) *United Nations system*: International Maritime Organization (IMO), Office of Legal Affairs (OLA), Office of the High Commissioner for Human Rights (OHCHR), United Nations Development Programme (UNDP), the World Bank and the World Intellectual Property Organization (WIPO);

(b) *Intergovernmental organizations*: Caribbean Development Bank, European Bank for Reconstruction and Development (EBRD), Hague Conference on Private International Law (the Hague Conference), International Cotton Advisory Committee, International Development Law Organization (IDLO), International Institute for the Unification of Private Law (Unidroit), Maritime Organization of West and Central Africa (MOWCA), Organization for Economic Cooperation and Development (OECD), Organization of American States (OAS) and Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: African Center for Cyberlaw and Cybercrime Prevention, American Arbitration Association and International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), American Society of International Law (ASIL), Asia-Pacific Regional Arbitration Group (APRAG), Asociación Americana de Derecho Internacional Privado, Association for the Promotion of Arbitration in Africa, Centre for International Environmental Law (CIEL), China International Economic and Trade Arbitration Committee (CIETAC), China Society of Private International Law, Comisión Interamericana de Arbitraje Comercial (CIAC-IACAC), Commercial Finance Association (CFA), European Communities Trade Mark Association, European Law Students' Association (ELSA), German Institution of Arbitration (DIS), Institute of Commercial Law, International Bar Association (IBA), International Chamber of Commerce (ICC), International Insolvency Institute (III), International Institute for Conflict Prevention and Resolution, International Law Institute, International Mediation Institute, International Swaps and Derivatives Association (ISDA), Inter-Pacific Bar Association (IPBA), Jerusalem Arbitration Center, Madrid Court of Arbitration, New York State Bar Association (NYSBA), P.R.I.M.E. Finance (P.R.I.M.E), Regional Centre for International Commercial Arbitration (Lagos, Nigeria) and Union Internationale des Avocats (UIA).

9. The Commission welcomed the participation of international non-governmental organizations with expertise in the major items on the agenda. Their participation was crucial for the quality of texts formulated by the Commission, and the Commission requested the Secretariat to continue to invite such organizations to its sessions.

### C. Election of officers

10. The Commission elected the following officers:

*Chair*: Mr. Choong-hee HAHN (Republic of Korea)

*Vice-Chairs*: Ms. Maria-Chiara MALAGUTI (Italy)

Mr. Salim MOOLLAN (Mauritius)

Mr. Hrvoje SIKIRIĆ (Croatia)

*Rapporteur*: Ms. Maria del Pilar ESCOBAR PACAS (El Salvador)

### D. Agenda

11. The agenda of the session, as adopted by the Commission at its 984th meeting, on 7 July, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of issues in the area of arbitration and conciliation:
  - (a) Finalization and approval of a draft convention on transparency in treaty-based investor-State arbitration;
  - (b) Establishment and functioning of the transparency repository;
  - (c) Preparation of a guide on the 1958 New York Convention;



- (d) International commercial arbitration moot competitions.
- 5. Micro-, small- and medium-sized enterprises: progress report of Working Group I.
- 6. Online dispute resolution: progress report of Working Group III.
- 7. Electronic commerce: progress report of Working Group IV.
- 8. Insolvency law: progress report of Working Group V.
- 9. Security interests: progress report of Working Group VI.
- 10. Technical assistance to law reform.
- 11. Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts.
- 12. Status and promotion of UNCITRAL legal texts.
- 13. Coordination and cooperation:
  - (a) General;
  - (b) Coordination and cooperation in the field of security interests;
  - (c) Reports of other international organizations;
  - (d) International governmental and non-governmental organizations invited to sessions of UNCITRAL and its Working Groups.
- 14. UNCITRAL regional presence.
- 15. Role of UNCITRAL in promoting the rule of law at the national and international levels.
- 16. Planned and possible future work.
- 17. Relevant General Assembly resolutions.
- 18. Other business.
- 19. Date and place of future meetings.
- 20. Adoption of the report of the Commission.

### **E. Adoption of the report**

- 12. The Commission adopted the present report by consensus at its 989th meeting on 9 July 2014, 990th meeting on 10 July 2014, 994th meeting on 14 July 2014, 995th meeting on 16 July 2014 and 997th meeting on 18 July 2014.

## **III. Consideration of issues in the area of arbitration and conciliation**

### **A. Finalization and approval of a draft convention on transparency in treaty-based investor-State arbitration**

#### **1. Introduction**

- 13. The Commission recalled the decision made at its forty-first session,<sup>1</sup> in 2008, and forty-third session,<sup>2</sup> in 2010, namely that the topic of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority immediately after completion of

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<sup>1</sup> *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 314.

<sup>2</sup> *Ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 190.

the revision of the UNCITRAL Arbitration Rules.<sup>3</sup> At its forty-third session, the Commission entrusted its Working Group II (Arbitration and Conciliation) with the task of preparing a legal standard on that topic.<sup>4</sup>

14. At its forty-sixth session, in 2013, the Commission adopted the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the “Rules on Transparency” or the “Rules”), together with the UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013).<sup>5</sup> At that session, the Commission recorded consensus to entrust the Working Group with the task of preparing a convention on the application of the Rules on Transparency to existing investment treaties (the “transparency convention” or the “convention”), taking into account that the aim of the convention was to give those States that wished to make the Rules on Transparency applicable to their existing investment treaties an efficient mechanism to do so, without creating any expectation that other States would use the mechanism offered by the convention.<sup>6</sup>

15. At its current session, the Commission had before it the reports of Working Group II (Arbitration and Conciliation) on the work of its fifty-ninth session, held in Vienna from 16 to 20 September 2013, and its sixtieth session, held in New York from 3 to 7 February 2014 (A/CN.9/794 and A/CN.9/799, respectively). It also had before it the text of the draft convention on transparency in treaty-based investor-State arbitration (the “draft convention on transparency” or the “draft convention”), as it resulted from the second reading of the draft convention at the sixtieth session of the Working Group and as contained in document A/CN.9/812.

16. The Commission took note of the summary of the deliberations on the draft convention on transparency that had taken place at the fifty-ninth and sixtieth sessions of the Working Group. The Commission also took note of the comments on the draft convention on transparency as set out in document A/CN.9/813 and its addendum.

## 2. Consideration of the draft convention on transparency

### Preamble

17. The Commission considered the preamble of the draft convention on transparency as set out in paragraph 5 of document A/CN.9/812 and recalled the deliberations of the Working Group on the preamble (see A/CN.9/794, paras. 33-43, and A/CN.9/799, paras. 16-20). The Commission further endorsed the agreement of the Working Group at its fifty-ninth and sixtieth sessions not to include in the preamble the wording of the mandate given by the Commission to the Working Group (see para. 14 above), but rather that the proposal for the General Assembly resolution recommending the convention contain the wording as set out in paragraph 41 of document A/CN.9/794.

18. The Commission considered that the inclusion of the word “investment” after the word “concluded” in the fourth paragraph of the preamble (see A/CN.9/812, para. 7) improved the drafting and ought to be retained.

19. The Commission took note of a suggestion to add a paragraph to the end of the preamble as follows: “Noting also article 1(2) and (9) of the UNCITRAL Rules on Transparency,” (see A/CN.9/812, para. 7). After discussion, that proposal was agreed.

<sup>3</sup> For the text of the UNCITRAL Arbitration Rules (1976), see *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17)*. For the text of the UNCITRAL Arbitration Rules (as revised in 2010), see *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, annex I.

<sup>4</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 190.

<sup>5</sup> *Ibid.*, *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 128 and annexes I and II.

<sup>6</sup> *Ibid.*, para. 127.

*Approval of the preamble*

20. After discussion, the Commission approved the substance of the preamble as contained in paragraph 5 of document A/CN.9/812, inclusive of a new paragraph as set out in paragraph 19 above.

**Draft article 1: Scope of application**

21. The Commission considered article 1 of the draft convention on transparency as set out in paragraph 5 of document A/CN.9/812 and recalled the deliberations of the Working Group on that article (see A/CN.9/794, paras. 44-82, and A/CN.9/799, paras. 21-26).

22. The Commission affirmed the decision of the Working Group at its sixtieth session to use the term “investment treaty” in relation to the underlying investment treaties to which the convention would apply (see A/CN.9/799, para. 26).

*Approval of article 1*

23. After discussion, the Commission approved the substance of article 1 as contained in paragraph 5 of document A/CN.9/812.

**Draft article 2: Application of the UNCITRAL Rules on Transparency**

24. The Commission considered article 2 of the draft convention on transparency as set out in paragraph 5 of document A/CN.9/812 and recalled the deliberations of the Working Group on that article (see A/CN.9/794, paras. 89-114, and A/CN.9/799, paras. 29-47 and 88-128).

*Relation between the transparency convention and the investment treaties to which it would apply*

25. The Commission unanimously confirmed that it shared the view expressed by a great number of delegations at the fifty-ninth session of the Working Group, namely that the transparency convention, upon coming into force, would constitute a successive treaty creating new obligations pursuant to article 30 of the Vienna Convention on the Law of Treaties (1969)<sup>7</sup> (the “Vienna Convention”) (see A/CN.9/794, para. 22).

*Paragraph (1)*

26. The Commission considered a suggestion to delete the language “[, as they may be revised from time to time,]”, in light of the text in article 2(3), and article 3(2), which addressed the application of the Rules on Transparency in the event of a revision to the Rules. It was clarified that deleting that language in paragraph (1) would remove an ambiguity in the Rules as to which version of the Rules would apply when the respondent State had made a reservation in respect of the application of the most recent version under article 3(2).

27. After discussion, it was agreed to delete the square bracketed language “[, as they may be revised from time to time,]” in paragraphs (1) and (2).

*Paragraph (2)*

28. Following its decision as set out in paragraph 27 above, the square bracketed phrase “[, as they may be revised from time to time,]” would also be deleted from paragraph (2).

29. A proposal was made to modify the drafting of paragraph (2) to require explicit written agreement by the claimant to the application of the Rules on Transparency. That proposal would modify the latter half of paragraph (2) as follows: “(...) under article 3(1), provided that the claimant agrees explicitly and in writing, to the application (...)”. That proposal was not supported on the basis that article 2 of the draft convention addressed the application of the Rules on Transparency, which themselves set out the mechanics of a claimant’s agreement in articles 1(2) and (9), and that requiring a specific form of agreement under the convention was not desirable.

<sup>7</sup> United Nations, *Treaty Series*, vol. 1155, No. 18232.

30. A clarification was sought as to why the word “an” preceded the phrase “investor-State arbitration” in paragraph (2), whereas the word “any” preceded that phrase in paragraph (1). It was clarified that the word “any” was deliberately used in paragraph (1) to reflect that that paragraph applied to all arbitrations falling within its scope, whereas in paragraph (2), the use of the word “an” reflected that that paragraph applied to specific arbitrations upon an offer by the respondent and an acceptance of that offer by the claimant.

*Paragraph (3)*

31. Further to its decision to delete the words “as they may be revised from time to time” from paragraphs (1) and (2) (see para. 27 above), it was agreed to retain paragraph (3) as providing useful clarity in respect of the application of the Rules following an amendment thereto.

32. It was furthermore agreed to delete the reference to an arbitral tribunal, so that paragraph (3) would read in full: “Where the UNCITRAL Rules on Transparency apply pursuant to paragraph 1 or 2, the most recent version of those Rules as to which the respondent has not made a reservation pursuant to article 3(2) shall apply.”

*Paragraph (5)*

33. It was recalled that at the fifty-ninth and sixtieth sessions of the Working Group, it had been agreed that a claimant should not be permitted to avoid application of the Rules on Transparency by invoking a most favoured nation (MFN) clause, and nor should a claimant be permitted to invoke an MFN clause to make the Rules on Transparency applicable in circumstances where the Rules would not otherwise apply (see A/CN.9/794, paras. 118-121, and A/CN.9/799, paras. 40-46, 88-96 and 123-124).

34. The Commission confirmed that the deliberations on MFN clauses in the context of the convention should not be interpreted as taking, and did not take, a position on the question of whether MFN clauses applied to dispute settlement procedures under investment treaties.

35. The Commission considered whether to delete the words “[or non-application]”, in order to improve clarity of drafting in paragraph (5). A concern was raised that removing that language would change the intended meaning of the provision, namely that paragraph (5) should also preclude a claimant applying the Rules on Transparency when the Rules would not otherwise apply under the convention. To address that concern, it was proposed to rephrase paragraph (5) as follows: “The Parties to this Convention agree that a claimant may not invoke a most favored nation provision to seek to apply, or avoid the application of, the UNCITRAL Rules on Transparency under this Convention”.

36. The suggestion to address in paragraph (5) application of different versions of the Rules did not receive support.

37. After discussion, the proposal set out in paragraph 35 above was approved in substance by the Commission.

*Paragraph headings*

38. It was said that the heading “Unilateral offer of application” preceding paragraph (2) should be reconsidered since an offer was by its nature unilateral and moreover that heading did not clarify that the offer could only be made by the respondent under that paragraph. A suggestion was consequently made to replace that heading with the heading “Irrevocable offer”. That suggestion did not receive support, in particular because it was said that it would be at odds with article 4, paragraph (1), which provided that a reservation could be made at any time; hence an offer under article 2(2) was not necessarily irrevocable.

39. Another proposal was made to replace the heading with the word “Offer”, in light of the self-evidently unilateral nature of any offer.

40. A third proposal was made to rephrase the heading such that it made clear that the offer was of unilateral application by a treaty Party; in other words, that only one treaty Party had made the offer to apply the Rules on Transparency and that it would be for the claimant

to accept that offer. In response, it was said that the heading “Offer of unilateral application” might not convey clearly that intended meaning.

41. It was furthermore suggested that the term “unilateral offer of application” provided a helpful contrast to the heading preceding paragraph (1), namely “Bilateral or multilateral application”, and that as such it provided a clear indication of the content and purposes of the two paragraphs.

42. After discussion, it was agreed to retain the heading “Unilateral offer of application” preceding paragraph (2).

43. The Commission approved the proposed headings for all other paragraphs of article 2 as set out in paragraph 5 of document A/CN.9/812.

#### *Approval of article 2*

44. After discussion, the Commission approved the substance of article 2 as contained in paragraph 5 of document A/CN.9/812, and as modified by paragraphs 27, 28, 31, 32 and 37 above.

#### **Draft article 3: Reservations**

45. The Commission considered article 3 of the draft convention on transparency as set out in paragraph 5 of document A/CN.9/812. The Commission noted that the language set out therein had been approved in substance at the sixtieth session of the Working Group (see A/CN.9/799, paras. 51-55 and 97-128; for deliberations on article 3 at the fifty-ninth session of the Working Group, see A/CN.9/794, paras. 115-147).

46. The Commission furthermore confirmed the unanimous agreement of the Working Group that it would be unacceptable for a Party to the transparency convention to accede to the transparency convention and then carve out its entire content by use of reservations under article 3 (see A/CN.9/794, paras. 131-133). The Commission further took note of the clear indication of consensus at the fifty-ninth and sixtieth sessions of the Working Group that the only reservations permitted under the convention ought to be those enumerated in the transparency convention (see A/CN.9/794, para. 147, and A/CN.9/799, para. 55).

#### *Paragraph (1)*

##### *Subparagraph (a)*

47. A proposal was made to modify subparagraph (a) with three amendments, namely: (a) to add the words “to which it is a contracting party” after the phrase “a specific investment treaty”; (b) to replace the words “date that investment treaty was concluded” with “date that investment treaty was signed by the Party making the reservation”; and (c) to add the words “in cases where it is the respondent in an arbitration brought under that treaty” to the end of the subparagraph.

48. After discussion, it was said that that proposal might create additional complexity in some respects, and a revised proposal was made to replace subparagraph (a) as follows: “It shall not apply this Convention to investor-State arbitration under a specific investment treaty, identified by title and name of contracting parties to that investment treaty.” A suggestion to insert the word “the” before the phrase “contracting parties” in that revised proposal, and consequently also in article 8(1), was agreed.

49. After discussion, the revised proposal for article 3(1)(a) as set out in paragraph 48 above was agreed.

50. A separate proposal was made to replace, in the chapeau, the words “A Party may declare that:” with the phrase “A party may make the following reservations:”. That proposal did not receive support since the declaration referred to in that phrase was the mechanism through which a reservation would be made.

*Paragraph (2)*

51. The Commission agreed to replace the phrase “amendment to” in the phrase “amendment to the UNCITRAL Rules on Transparency”, with “a revision of”, in order to align the drafting more closely with other provisions of the draft convention and the Rules. It was consequently agreed that the word “amendment” as it appeared later in that provision would also be replaced with the word “revision”. For the sake of drafting consistency, it was agreed to replace the word “will” appearing before the words “not apply” by the word “shall”. In all other respects it was agreed to retain paragraph (2) in the form set out in paragraph 5 of document A/CN.9/812.

52. It was confirmed that the UNCITRAL secretariat would follow its usual practice of notifying all States of the revision of the Rules.

*Approval of article 3*

53. After discussion, the Commission approved the substance of article 3 as contained in paragraph 5 of document A/CN.9/812, and as modified by paragraphs 49 and 51 above and paragraph 73 below.

**Draft article 4: Formulation of reservations**

54. The Commission considered article 4 of the draft convention on transparency as set out in paragraph 5 of document A/CN.9/812. The Commission recalled the deliberations of the Working Group on that article (see A/CN.9/794, paras. 123-126 and 149-152, and A/CN.9/799, paras. 56-69, 134(a) and 136).

*New paragraph to be inserted after paragraph 3*

55. A proposal was made to add a new paragraph after paragraph (3) in article 4, as follows: “Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto shall take effect simultaneously with the entry into force of this Convention in respect of the Party concerned.” It was said that such a provision would be more consistent with other timelines provided for in article 4.

56. After discussion, that proposal was agreed in substance.

*Paragraphs (2) and (3)*

57. It was said that the order of paragraphs (2) and (3) should be inverted to reflect the fact that confirmations of reservations were first mentioned in paragraph (3). After discussion, it was agreed that paragraph (2) would be better placed as the penultimate paragraph of article 4.

*Paragraph (4)*

58. A suggestion was made to clarify the drafting of paragraph (4) by adding the words “made by a Party” following the words “Except for a reservation”. That proposal was agreed.

*Paragraph (5)*

59. The Commission agreed to retain paragraph (5) in the form set out in paragraph 5 of document A/CN.9/812, subject to its further consideration of, and any consequential amendments that might be required by, paragraph (6).

*Paragraph (6)*

60. The Commission affirmed the agreement of the Working Group that a withdrawal providing for greater transparency ought to have immediate effect, whereas all other modifications ought to take effect twelve months after receipt by the depositary, as a measure to avoid abuse (see A/CN.9/794, paras. 153-157, and A/CN.9/799, paras. 63-69, 134(a) and 136).

61. A concern was raised that the language set out in paragraph (6) referring to a modification to a reservation “with the effect of making (...) a withdrawal” of a reservation was difficult to interpret and might in any event be unnecessary.

62. A clarification was sought as to whether, when a Party to the convention deposited a list of a number of treaties as a single “reservation” under article 3(1)(a), that list would in practice constitute a single reservation, or separate reservations in respect of each treaty listed. It was agreed that such a list would constitute separate reservations, and the Commission decided to consider further whether such an understanding ought to be made explicit in the convention itself.

63. As a corollary to that determination, it was said that “modifications” of a reservation to the transparency convention would no longer be an appropriate term, because in the event a number of treaties had been listed pursuant to article 3(1)(a), the addition or removal of any specific investment treaty from that list would constitute either a new reservation, or the withdrawal of a reservation.

64. Having regard to those clarifications, the Commission considered a proposal to amend paragraph (6) as follows: “If after this Convention has entered into force for a Party, that Party withdraws a reservation under article 3(1)(a) or (b) with respect to a specific investment treaty or a specific set of arbitration rules or procedures, or a reservation under article 3(1)(c) or (2), such withdrawal shall take effect upon receipt of the notification by the depositary.”

65. It was said that that proposal would obviate the need for reference to modifications in paragraph (5), as well as in article 5, and would result in the deletion of paragraph (7) as redundant.

#### *Article 4(6) and new article 3(3)*

66. After discussion, a revised proposal was made that was said likewise to obviate the need for references to modifications even where a Party was to deposit multiple reservations within the same instrument and withdraw only one such reservation.

67. That revised proposal read as follows: “When a party makes a declaration under article 3, each investment treaty or set of arbitration rules or procedures to which the declaration refers, and any part of the declaration made under paragraph 1(c) or (2) shall be deemed to constitute a separate reservation for purposes of article 4.”

68. It was said that that revised proposal was best placed in article 3, as a separate provision to follow paragraph (2).

69. Various amendments were made to that revised proposal, such that it would read as follows: “Parties may make multiple declarations in a single instrument. When this occurs, each such declaration in respect of a specific investment treaty under article 3(1)(a) or specific set of arbitration rules or procedures under article 3(1)(b), or any such declaration in respect of article 3(1)(c) or article 3(2), shall constitute a separate reservation capable of separate withdrawal under article 4(5).”

70. A suggestion was made to omit the language “When this occurs” from that proposal. Another suggestion was made to replace the word “declaration” in that proposal where it appeared as a noun, with the word “reservation”. A further suggestion was made to change the reference in the first line of that proposal to “reservations”, and retain the word “declaration” where it appeared in the second sentence, to reflect that a reservation was the result of the making of a declaration under article 3. That suggestion would require the retention of the words “When this occurs” to create the link between the reservation in the first sentence, and the mechanism by which that reservation was effected (e.g., a declaration) in the second sentence.

71. Following those suggestions, a further revised proposal was made as follows: “Parties may make multiple reservations in a single instrument. In such an instrument, each declaration made: (a) In respect of a specific investment treaty under paragraph (1)(a); (b) In respect of a specific set of arbitration rules or procedures under paragraph (1)(b);

(c) Under paragraph (1)(c); or (d) Under paragraph (2); shall constitute a separate reservation capable of separate withdrawal under article 4(6).”

72. A question was raised as to whether the language “capable of separate withdrawal under article 4(6)” was necessary. It was said in response that that language, while not strictly required, would be helpful to provide clarity.

73. After discussion, it was agreed: (a) to adopt the text as set out in paragraph 71 above; (b) to place that text as a new paragraph in article 3, to follow paragraph (2); (c) to revise article 4(6) as contained in paragraph 64 above, to eliminate duplicative language in that article; and (d) to remove all references to “modification of a reservation” in articles 4 and 5.

#### *Drafting matters*

74. It was agreed that throughout article 4, references to “receipt of notification”, would be replaced by references to deposit with the depositary, to align better the drafting of that article with United Nations treaty practice.

#### *Approval of article 4*

75. After discussion, the Commission approved the substance of article 4 as contained in paragraph 5 of document A/CN.9/812, and as modified by paragraphs 55, 56, 57, 73 and 74 above.

#### **Draft article 5: Application to investor-State arbitrations**

76. The Commission considered article 5 of the draft convention on transparency as set out in paragraph 5 of document A/CN.9/812. The Commission noted that the language set out therein had been approved in substance at the sixtieth session of the Working Group (see A/CN.9/799, para. 76).

77. A proposal was made to add the word “concerned” after the phrase “in respect of each Party” in order to align the wording more closely with other provisions in the draft convention (such as article 4(3)). That proposal was agreed.

78. As matters of drafting, proposals to insert the word “shall” before the words “apply”, and to replace the words “have been” appearing before the word “commenced” with “are”, were agreed.

79. Consequent to the proposals agreed as set out in paragraphs 77 and 78 above, article 5 would read as follows: “This Convention and any reservation or withdrawal of a reservation, shall apply only to investor-State arbitrations that are commenced after the date when the Convention, reservation, or withdrawal of a reservation, enters into force or takes effect in respect of each Party concerned.”

#### *Approval of article 5*

80. After discussion, the Commission approved the substance of article 5 as set out in paragraph 79 above.

#### **Draft article 6: Depositary**

81. The Commission noted that the Working Group had considered article 6 at its fifty-ninth and sixtieth sessions (see A/CN.9/794, para. 159, and A/CN.9/799, para. 70).

#### *Approval of article 6*

82. The Commission approved the substance of article 6 as set out in paragraph 5 of document A/CN.9/812.

#### **Draft article 7: Signature, ratification, acceptance, approval, accession**

83. The Commission considered article 7 of the draft convention on transparency as set out in paragraph 5 of document A/CN.9/812. The Commission noted that the language set



out therein had been approved in substance at the sixtieth session of the Working Group (see A/CN.9/799, para. 71; for deliberations on article 7 at the fifty-ninth session of the Working Group, see A/CN.9/794, paras. 160-164).

84. In connection with draft article 7, the attention of the Commission was drawn to an invitation from the Government of Mauritius to participate in an event for the celebration of the adoption of the convention. If approved by the General Assembly, the Mauritius event would include a ceremony for the signing of the convention, once adopted. The event was also envisioned to include a seminar under the auspices of UNCITRAL. The Commission was informed that the Government of Mauritius was prepared to assume the additional costs that might be incurred by convening a signing ceremony outside the premises of the United Nations so that the organization of the proposed event and the signing ceremony would not require additional resources under the United Nations budget.

85. The Commission expressed its gratitude for the generosity of the Government of Mauritius in offering to act as host for such an event, and that proposal was unanimously supported.

*Paragraph (1)*

86. It was observed that, given the strong positive response of the Commission to the invitation to attend a signing ceremony in Mauritius, the text of draft article 7 ought to be adjusted to include Mauritius as the place at which the transparency convention would be opened for signature and the instrument could then be opened for further signature at United Nations Headquarters in New York.

87. There was broad support for that suggestion and the Commission agreed that paragraph (1) of article 7 would read: "This Convention is open for signature in Port Louis, Mauritius, on 17 March 2015, and thereafter at the United Nations Headquarters in New York by any (a) State; or (b) regional economic integration organization that is constituted by States and is a contracting party to an investment treaty."

*Approval of article 7*

88. After discussion, the Commission approved the substance of article 7 as contained in paragraph 5 of document A/CN.9/812, and as modified in paragraph 87 above.

**Draft article 8: Participation by regional economic integration organizations**

89. The Commission considered article 8 of the draft convention on transparency as set out in paragraph 5 of document A/CN.9/812 and took note of the previous deliberations of the Working Group on that article (see A/CN.9/794, paras. 168-170, and A/CN.9/799, paras. 74 and 129-133).

*Paragraph (1)*

90. A proposal was made to delete the phrase " , and date that investment treaty was concluded", to provide for consistency with the proposed deletion of the reference to the date of conclusion of investment treaties in article 3 (see paras. 48-49 above). In response, it was said that in paragraph (1) of article 8, the reference to a date of conclusion of an investment treaty was intended to alert the depositary to the fact that the treaty in question fell within the scope of application of the convention, and in particular that such treaty was concluded prior to 1 April 2014.

91. It was observed that article 7(1) already provided for the relevant requirements for a regional economic organization to become a Party to the convention. After discussion, it was agreed to delete the phrase " , and date that investment treaty was concluded" from article 8(1).

92. In all other respects, paragraph (1) as set out in paragraph 5 of document A/CN.9/812 was approved in substance.

*Approval of article 8*

93. After discussion, the Commission approved the substance of article 8 as set out in paragraph 5 of document A/CN.9/812, and as modified by paragraph 91 above.

**Draft article 9: Entry into force**

94. The Commission considered article 9 of the draft convention on transparency as set out in paragraph 5 of document A/CN.9/812. The Commission noted that the language therein had been approved in substance at the sixtieth session of the Working Group (see A/CN.9/799, para. 75; for deliberations on article 9 at the fifty-ninth session of the Working Group, see A/CN.9/794, paras. 171-175).

*Paragraph (1)*

95. A proposal to replace the phrase “enters into force” with the phrase “shall enter into force” was agreed.

*Approval of article 9*

96. After discussion, the Commission approved the substance of article 9 as set out in paragraph 5 of document A/CN.9/812, and as modified by paragraph 95 above.

**Draft article 10: Amendment**

97. The Commission considered article 10 of the draft convention on transparency as set out in paragraph 5 of document A/CN.9/812. The Commission noted that the language therein had been approved in substance at the sixtieth session of the Working Group, based on proposals made at that session (see A/CN.9/799, paras. 78 and 138-146; for deliberations on article 10 at the fifty-ninth session of the Working Group, see A/CN.9/794, paras. 177-178).

*Paragraph (2)*

98. A proposal was made to replace the first sentence of paragraph (2) as follows, “The Parties shall make every effort to achieve consensus at the conference on each amendment”. That proposal did not receive support.

99. A proposal to replace the phrases “have been exhausted” and “has been reached” with the phrases “are exhausted” and “is reached”, respectively, was accepted.

*Paragraph (4)*

100. A suggestion was made to replace the words “expressed consent to be bound” with examples of how that consent might be expressed, for example through the deposit of an instrument of ratification, acceptance or approval. It was said in response that means of consent were addressed by the Vienna Convention, and consequently did not need to be explicitly addressed in the transparency convention.

*Approval of article 10*

101. After discussion, the Commission approved the substance of article 10 as contained in paragraph 5 of document A/CN.9/812, and as modified by paragraph 99 above.

**Draft article 11: Denunciation of this Convention**

102. The Commission considered article 11 of the draft convention on transparency as set out in paragraph 5 of document A/CN.9/812. The Commission noted that the language set out therein had been approved in substance at the sixtieth session of the Working Group (see A/CN.9/799, paras. 79-80; for deliberations on article 11 at the fifty-ninth session of the Working Group, see A/CN.9/794, para. 179).

*Paragraph (1)*

103. A suggestion was made to replace the term “notification in writing” with the term “formal notification” in line with other provisions in the draft convention. That proposal was agreed, it having been clarified that it was the understanding of the Commission that formal notifications did take place in writing and that it was consequently not necessary to include the words “in writing” in the convention itself.

*Approval of article 11*

104. After discussion, the Commission approved the substance of article 11 as set out in paragraph 5 document A/CN.9/812, and as modified by paragraph 103 above.

*Title of the transparency convention*

105. The Commission agreed that the title of the transparency convention should be the “United Nations Convention on Transparency in Treaty-based Investor-State Arbitration”. Further to the offer of the Government of Mauritius to host a signing ceremony for the transparency convention (see paras. 84-87 above), the Commission further agreed that the convention should also be known as the “Mauritius Convention on Transparency” in English and “La Convention de l’Ile Maurice sur la Transparence” in French.

**3. Decision of the Commission and recommendation to the General Assembly**

106. At its 988th meeting, on 9 July 2014, the Commission adopted by consensus the following decision and recommendation to the General Assembly:

*“The United Nations Commission on International Trade Law,*

*“Recalling General Assembly resolution 68/109 of 16 December 2013 recommending the use of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration<sup>8</sup> and Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013),<sup>9</sup> and further recommending that subject to any provision in relevant treaties that may require a higher degree of transparency than that provided in the Rules on Transparency, the Rules be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to treaties providing for the protection of investors or investments concluded before the date of coming into effect of the Rules, to the extent that such application is consistent with those treaties,*

*“Further recalling that, at its forty-sixth session in 2013, it entrusted Working Group II (Arbitration and Conciliation) with the preparation of a convention to give those States that wished to make the Rules on Transparency in Treaty-based Investor-State Arbitration applicable to their existing treaties an efficient mechanism to do so, without creating any expectation that other States would use the mechanism offered by the convention,<sup>10</sup>*

*“Noting that the Working Group devoted two sessions, in 2013 and 2014, to the preparation of the draft convention on transparency in treaty-based investor-State arbitration,<sup>11</sup>*

*“Further noting that the preparation of the draft convention was the subject of due deliberation in the Commission and that the draft convention benefited from consultations with Governments and interested intergovernmental and international non-governmental organizations,*

*“Having considered the draft convention at its forty-seventh session, in 2014,*

*“Drawing attention to the fact that the text of the draft convention was circulated for comment before the forty-seventh session of the Commission to all Governments*

<sup>8</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17), chap. III and annex I.*

<sup>9</sup> *Ibid.*, chap. III and annex II.

<sup>10</sup> *Ibid.*, para. 127.

<sup>11</sup> For the reports of those sessions of the Working Group, see A/CN.9/794 and A/CN.9/799.

invited to attend sessions of the Commission and the Working Group as members and observers and that the comments received were before the Commission at its forty-seventh session,<sup>12</sup>

“*Considering* that the draft convention has received sufficient consideration and has reached the level of maturity for it to be generally acceptable to States,

“1. *Submits* to the General Assembly the draft convention on transparency in treaty-based investor-State arbitration, as it appears in annex I to the present report;

“2. *Recommends* that the General Assembly, taking into account the extensive consideration given to the draft convention by the Commission and its Working Group II (Arbitration and Conciliation), consider the draft convention with a view to: (a) adopting, at its sixty-ninth session, on the basis of the draft convention approved by the Commission, a United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration; (b) authorizing a signing ceremony to be held on 17 March 2015 in Port Louis, Mauritius, upon which the Convention would be open for signature; and (c) recommending that the Convention be known as the “Mauritius Convention on Transparency” in English and “La Convention de l’Ile Maurice sur la Transparence” in French;

“3. *Requests* the Secretary-General to publish the Convention, upon adoption, including electronically and in the six official languages of the United Nations, and to disseminate it broadly to Governments and other interested bodies.”

## **B. Establishment and functioning of the transparency repository**

107. For their implementation, the Rules on Transparency require the establishment of a repository to publish information under the Rules (article 8). The Commission recalled that, at its forty-sixth session, in 2013, it expressed its strong and unanimous opinion that the UNCITRAL secretariat should fulfil the role of the transparency repository.<sup>13</sup> It was 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 repository under the Rules on Transparency, as a public administration directly responsible for the servicing and proper operation of its own legal standards.<sup>14</sup> The Commission requested the Secretariat to report to the Commission at its next session on the status of the establishment and functioning of the transparency repository.<sup>15</sup> The General Assembly, in paragraph 3 of its resolution 68/106, invited the Secretary-General to consider performing, in accordance with article 8 of the Rules on Transparency, the role of the transparency repository through the secretariat of the Commission, and requested the Secretary-General to report to the General Assembly and the Commission in this regard.

108. Accordingly, the Secretariat reported on steps taken for meeting the demands of the Commission in respect of the repository function to be performed by the UNCITRAL secretariat. In the context of an upgrade of the UNCITRAL website to facilitate the functioning of the CLOUT database (see para. 175 below), a dedicated web page has been set up by the Secretariat and is accessible at: [www.uncitral.org/transparency-registry](http://www.uncitral.org/transparency-registry). Consistent with the aim to enhance transparency in treaty-based investor-State arbitration, the Transparency Registry would publish information and documents where the Rules on Transparency (whether or not amended by the Parties to the treaty) applied pursuant to article 1 of the Rules; or where the Transparency Registry was appointed for the publication of information and documents in treaty-based investor-State arbitration, either by Parties to an investment treaty or by the parties to a dispute. Noting that no information or documents had yet been posted, the Commission welcomed an indication that the Government of

<sup>12</sup> A/CN.9/813 and its addendum.

<sup>13</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 80.

<sup>14</sup> *Ibid.*, para. 79.

<sup>15</sup> *Ibid.*, para. 98.

Canada had proposed to publish on the Registry web page information in respect of Canadian cases rendered under the North American Free Trade Agreement (NAFTA). It was stated that such publication would play an educational role and illustrate the role to be played by the registry as a global reference on transparency in investor-State treaty-based arbitration.

109. The Commission expressed its appreciation for the establishment of the transparency registry website and for the work of the Secretariat in relation thereto. The Commission was informed that, consistent with the mandate received from the Commission at its forty-sixth session,<sup>16</sup> the Secretariat had sought from the General Assembly the funding necessary to enable the UNCITRAL secretariat to undertake the role of transparency repository. In line with the request by some States that the additional mandate bestowed on the UNCITRAL secretariat be fulfilled on a cost-neutral budgetary basis in relation to the United Nations regular budget, efforts were made to establish the Registry as a pilot project temporarily funded by voluntary contributions. The Commission expressed its appreciation to the European Union for its commitment to provide funding that would allow the Secretariat to recruit the necessary project staff. The Commission encouraged the Secretariat to pursue its efforts to raise the necessary funding through extrabudgetary resources. In response, it was pointed out that, while extrabudgetary funding of the Registry could be envisaged for an initial trial period, its long-term operation would depend on the availability of additional regular budget resources. Should such additional resources remain unavailable at the end of the trial period, alternative solutions would have to be envisaged, such as redeploying resources within the Secretariat, or entrusting entities outside the United Nations with the performance of the repository function, as envisaged by the Commission at its forty-sixth session as a possible temporary solution.<sup>17</sup>

110. After discussion, the Commission recalled its own mandate to “further the progressive harmonization and unification of the law of international trade by: [...] promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws; [...] preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field; [...] promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade; [...] and taking any other action it may deem useful to fulfil its functions”.<sup>18</sup> On that basis, it reiterated its mandate to its secretariat to establish and operate the Transparency Registry, initially as a pilot project, and, to that end, to seek any necessary funding.

### C. Preparation of a guide on the New York Convention

111. At its forty-first session, in 2008, the Commission agreed that work should be undertaken to eliminate or limit the effect of legal disharmony regarding the implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958,<sup>19</sup> (the New York Convention) by States, its interpretation and its application. The Commission was generally of the view at that session that the outcome of the work should consist in the development of a guide on the New York Convention, with a view to promoting a uniform interpretation and application of the Convention. It was considered that such a guide could assist with problems of legal uncertainty resulting from the imperfect or partial implementation of the Convention and could limit the risk that practices of States diverged from the spirit of the Convention. At that session, the Commission requested the Secretariat to study the feasibility of preparing such a guide. Also at that session, the Commission agreed that, resources permitting, the activities of the Secretariat in the context of its technical assistance programme could include dissemination

<sup>16</sup> Ibid., para. 82.

<sup>17</sup> Ibid., paras. 97-98.

<sup>18</sup> General Assembly resolution 2205 (XXI) of 17 December 1966.

<sup>19</sup> United Nations, *Treaty Series*, vol. 330, No. 4739.

of information on the judicial interpretation of the New York Convention, which would usefully complement other activities in support of the Convention.<sup>20</sup>

112. The Commission recalled that it had been informed, at its forty-fourth and forty-fifth sessions, in 2011 and 2012, that the Secretariat was carrying out a project on the preparation of a guide on the New York Convention, in close cooperation with two experts, E. Gaillard (Sciences Po Paris, École de Droit) and G. Bermann (Columbia University School of Law), who had established research teams to work on that project. The Commission had been informed that Mr. Gaillard and Mr. Bermann, in conjunction with their respective research teams and with the support of the Secretariat, had established a website ([www.newyorkconvention1958.org](http://www.newyorkconvention1958.org)) to make the information gathered in preparation of the guide on the New York Convention publicly available. The website was aimed at promoting the uniform and effective application of the Convention by making available details on its judicial interpretation by States parties. The Commission had also been informed that the UNCITRAL secretariat planned to maintain close connection between the cases in the system for collecting and disseminating case law relating to UNCITRAL texts (CLOUT) (see paras. 170-176 below) and the cases available on the website dedicated to the preparation of the guide on the New York Convention.<sup>21</sup> At its forty-fifth session, in 2012, the Commission expressed its appreciation for the establishment of the website on the New York Convention and the work done by the Secretariat, as well as by the experts and their research teams, and requested the Secretariat to pursue efforts regarding the preparation of the guide on the New York Convention.<sup>22</sup>

113. By paragraph 6 of its resolution 66/94, the General Assembly noted with appreciation the decision of the Commission to request the Secretariat to pursue its efforts towards the preparation of a guide on the Convention.<sup>23</sup> By paragraph 5 of its resolution 68/106, the General Assembly noted “with appreciation the projects of the Commission aimed at promoting the uniform and effective application of the Convention [...], including the preparation of a guide on the Convention, in close cooperation with international experts, to be submitted to the Commission at a future session for its consideration.”

114. At its forty-sixth session, the Commission had before it an excerpt of the guide on the New York Convention for its consideration (A/CN.9/786). Concerns were expressed at that session that a guide would indicate preference for some views over others, and would therefore not reflect an international consensus on the interpretation of the New York Convention. The question of the form in which the guide might be published was therefore raised. In response, it was pointed out that the drafting approach adopted in the preparation of the guide was similar to that of other UNCITRAL guides or digests.<sup>24</sup> The Commission requested the Secretariat to submit the guide to the Commission at its forty-seventh session for further consideration of the status of the guide and how it would be published.<sup>25</sup>

115. Pursuant to that request, the Commission at its current session had additional excerpts of the Guide (A/CN.9/814 and its addenda), and considered: (a) the inclusion of a disclaimer in the Guide to address the concerns expressed at the forty-sixth session (see para. 114 above); and (b) the title of the Guide.

116. After discussion, the Commission agreed to include a disclaimer in the Guide as follows: “The Guide is a product of the work of the Secretariat based on expert input, and was not substantively discussed by the United Nations Commission on International Trade Law (UNCITRAL). Accordingly, the Guide does not purport to reflect the views or opinions

<sup>20</sup> *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), paras. 355 and 360.

<sup>21</sup> *Ibid.*, *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 252; and *ibid.*, *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 135.

<sup>22</sup> *Ibid.*, *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 136.

<sup>23</sup> See also General Assembly resolution 67/89, paragraph 5, by which the General Assembly noted “with appreciation the projects of the Commission aimed at promoting the uniform and effective application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958, including the preparation of a guide on the Convention.”

<sup>24</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 138-140.

<sup>25</sup> *Ibid.*, para. 140.

of UNCITRAL member States and does not constitute an official interpretation of the New York Convention.”

117. The Commission further agreed that the guide should be entitled “UNCITRAL Secretariat Guide on the New York Convention” and requested the Secretariat to publish the guide, including electronically, in the six official languages of the United Nations.

## **D. International commercial arbitration moot competitions**

### **1. Willem C. Vis International Commercial Arbitration Moot**

118. It was noted that the Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot had organized the Twenty-first Moot, the oral arguments phase of which had taken place in Vienna from 11 to 17 April 2014. As in previous years, the Moot had been co-sponsored by the Commission. Legal issues addressed by the teams of students participating in the Twenty-first Moot were based on the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)<sup>26</sup> (the United Nations Sales Convention). A total of 291 teams from law schools in 64 countries participated, with the best team in oral arguments being from the Deakin University, Australia. The oral arguments phase of the Twenty-second Willem C. Vis International Commercial Arbitration Moot will be held in Vienna from 27 March to 2 April 2015.

119. It was also noted that the Eleventh Willem C. Vis (East) International Commercial Arbitration Moot had been organized by the Chartered Institute of Arbitrators, East Asia Branch, and co-sponsored by the Commission. The final phase had been organized in Hong Kong, China, from 31 March to 6 April 2014. A total of 99 teams from 28 jurisdictions had taken part in the Eleventh (East) Moot. The winning team in the oral arguments was from the Loyola University Chicago School of Law, United States. The Twelfth (East) Moot would be held in Hong Kong, China, from 15 to 22 March 2015.

### **2. Madrid Commercial Arbitration Moot 2014**

120. It was noted that Carlos III University of Madrid had organized the Sixth International Commercial Arbitration Competition in Madrid from 21 to 25 April 2014. The Madrid Moot had also been co-sponsored by the Commission. The legal issues involved in the competition related to an international distribution contract and sale of goods in which the United Nations Sales Convention was applicable, as well as the UNCITRAL Model Law on International Commercial Arbitration,<sup>27</sup> the New York Convention and the Rules of Arbitration of the Court of Arbitration of Madrid.<sup>28</sup> A total of 21 teams from law schools or masters' programmes in eight countries had participated in the Madrid Moot in Spanish. The best team in oral arguments was Pontificia Universidad Católica del Perú. The Seventh Madrid Moot would be held from 20-24 April 2015.

## **E. Planned and possible future work**

121. In addition to the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (1996)<sup>29</sup> (the “Notes”), which the Commission had mandated its Working Group II (Arbitration and Conciliation) to undertake (see para. 122 below), the Commission considered two other areas of possible future work for the Working Group (see paras. 123-130 below).

<sup>26</sup> United Nations, *Treaty Series*, vol. 1489, No. 25567.

<sup>27</sup> For the text of the UNCITRAL Model Law on International Commercial Arbitration (1985), see *Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, annex I. For the text of the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, see *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, annex I (revised articles only), and United Nations publication, Sales No. E.08.V.4.

<sup>28</sup> Available from [www.camaramadrid.es/doc/linkext/rules-of-arbitration.pdf](http://www.camaramadrid.es/doc/linkext/rules-of-arbitration.pdf).

<sup>29</sup> *UNCITRAL Yearbook*, vol. XXVII: 1996, part three, annex II.

122. The Commission recalled that, at its forty-sixth session, in 2013, it considered that the Notes required updating as a matter of priority. It was agreed that the preferred forum for that work would be that of a Working Group, to ensure that the universal acceptability of the Notes would be preserved.<sup>30</sup>

123. At the current session, the Commission had before it a proposal for future work in relation to enforcement of international settlement agreements (A/CN.9/822). In support of that proposal, it was said that one obstacle to greater use of conciliation was that settlement agreements reached through conciliation might be more difficult to enforce than arbitral awards. In general, it was said that settlement agreements reached through conciliation are already enforceable as contracts between the parties<sup>31</sup> but that enforcement under contract law cross-border can be burdensome and time-consuming. Finally, it was said that the lack of easy enforceability of such contracts was a disincentive to commercial parties to mediate. Consequently, it was proposed that Working Group II develop a multilateral convention on the enforceability of international commercial settlement agreements reached through conciliation, with the goal of encouraging conciliation in the same way that the New York Convention had facilitated the growth of arbitration.

124. Support was expressed for possible work in that area on many of the bases expressed above. Doubts were also expressed as to the feasibility of the project and questions were raised in relation to that possible topic of work, including: (a) whether the new regime of enforcement envisaged would be optional in nature; (b) whether the New York Convention was the appropriate model for work in relation to mediated settlement agreements; (c) whether formalizing enforcement of settlement agreements would in fact diminish the value of mediation as resulting in contractual agreements; (d) whether complex contracts arising out of mediation were suitable for enforcement under such a proposed treaty; (e) whether other means of converting mediated settlement agreements into binding awards obviated the need for such a treaty; and (f) what the legal implications for a regime akin to the New York Convention in the field of mediation might be.

125. It was furthermore observed that UNICTRAL had previously considered that issue when preparing the UNCITRAL Model Law on International Commercial Conciliation (2002),<sup>32</sup> and particular reference was made to article 14 of the Model Law and paragraphs 90 and 91 of the Guide to Enactment and Use of that text.<sup>33</sup>

126. The Commission considered whether to mandate its Working Group II to undertake work in the field of concurrent proceedings in investment treaty arbitrations, recalling that it had identified, at its forty-sixth session, in 2013, that the subject of concurrent proceedings was increasingly important particularly in the field of investment arbitration and might warrant further consideration.<sup>34</sup> The Commission was informed that the International Arbitration Institute (IAI, Paris), the Geneva Centre for International Dispute Settlement (CIDS) and the Secretariat jointly organized a conference on that topic on 22 November 2013. It was furthermore mentioned that other organizations, including the OECD, had carried out research in relation to certain aspects of that topic.

127. It was said that parallel proceedings were posing serious issues in the field of treaty-based investor-State arbitration, and that future work in that area could be beneficial. In response, it was suggested that UNCITRAL ought not to limit its work to parallel proceedings arising in the context of investor-State arbitration, but rather, in light of the implication such work might have on other types of arbitration practice, to extend that work to commercial arbitration as well. It was also said, however, that parallel proceedings in investment arbitrations, and those in commercial arbitrations, raised different issues and might need to be considered separately.

<sup>30</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 130.

<sup>31</sup> Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (2002), para. 89. *UNCITRAL Yearbook*, vol. XXXIII: 2002, part three, annex II.

<sup>32</sup> *UNCITRAL Yearbook*, vol. XXXIII: 2002, part three, annex I.

<sup>33</sup> *Ibid.*, annex II.

<sup>34</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, paras. 131 and 132.



128. After discussion, the Commission agreed that the Working Group should consider at its sixty-first and, if necessary, sixty-second sessions, the revision of the Notes. In so doing the Working Group should focus on matters of substance, leaving drafting to the Secretariat.

129. The Commission further agreed that the Working Group should also consider at its sixty-second session the issue of enforcement of international settlement agreements resulting from conciliation proceedings and should report to the Commission at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area. The Commission invited delegations to provide information to the Secretariat in respect of that subject matter.

130. In relation to the issue of concurrent proceedings, the Commission agreed that the Secretariat should explore the matter further, in close cooperation with experts from other organizations working actively in that area. That work should focus on treaty-based investor-State arbitration, without disregarding the issue in the context of international commercial arbitration. The Commission requested the Secretariat to report to the Commission at a future session, outlining the issues at stake and identifying work that UNCITRAL might usefully undertake in the area.

#### **IV. Micro-, small- and medium-sized enterprises: progress report of Working Group I**

131. The Commission recalled its decision at its forty-sixth session, in 2013, to entrust Working Group I with work aimed at reducing the legal obstacles encountered by micro-, small- and medium-sized enterprises (MSMEs) throughout their life cycle, in particular, in developing economies.<sup>35</sup> It was also recalled that at that session, the Commission agreed that such work should commence with a focus on the legal questions surrounding the simplification of incorporation.<sup>36</sup> The Working Group commenced its work on that topic at its twenty-second session (New York, 10-14 February 2014) and the Commission had before it the report of the Working Group on its work at that session (A/CN.9/800). The Commission commended the Secretariat for the working papers and the report prepared for that session.

132. The Commission noted that the Working Group, at its twenty-second session, had engaged in preliminary discussions in respect of a number of broad issues relating to the development of a legal text on simplified incorporation. That discussion was based upon the issues raised in working paper A/CN.9/WG.I/WP.82, including: limited liability, legal personality, the protection of third parties and creditors dealing with the enterprise, registration of the business, sole ownership, minimum capital requirements, transparency in respect of beneficial ownership, internal governance issues, and freedom of contract, as well as the possible forms that the proposed legal text could take. The Commission also noted that the Working Group had requested the Secretariat to prepare a document setting out best practices in respect of business registration, as well as a template on simplified incorporation and registration containing contextual elements and experiences linked to the mandate of the Working Group, to provide the basis for drafting a possible model law, without discarding the possibility of the Working Group drafting different legal instruments, particularly, but not exclusively, as they applied to MSMEs in developing countries.<sup>37</sup>

133. It was observed that the fullest participation of States, particularly developing countries, in the Working Group was desirable in order to offer the widest possible range of experiences in the development of the legal standard. Access to credit was flagged as one important future issue for the Working Group, as well as alternative dispute resolution. It was said that some form of cooperation with other Working Groups would be needed.

<sup>35</sup> Ibid., paras. 321-322.

<sup>36</sup> Ibid., para. 321.

<sup>37</sup> A/CN.9/800, para. 65.

134. After discussion, the Commission reaffirmed the mandate of the Working Group, as expressed in the report of the Commission's forty-sixth session.<sup>38</sup>

## V. Online dispute resolution: progress report of Working Group III

135. The Commission recalled its decision at its forty-third session, in 2010, to entrust Working Group III to undertake work in the field of online dispute resolution (ODR) relating to cross-border electronic transactions.<sup>39</sup> At its current session, the Commission had before it reports of the Working Group on its twenty-eighth session (A/CN.9/795), held in Vienna from 18 to 22 November 2013, and twenty-ninth session (A/CN.9/801), held in New York from 24 to 28 March 2014.

136. The Commission welcomed the progress that was made at the twenty-eighth and twenty-ninth sessions of the Working Group, and agreed that the Working Group had made substantial progress on the text of Track II of the procedural rules on cross-border electronic transactions (the "Rules"), the subject of the Working Group's deliberations, including progress on many functional issues. It was further agreed that as there were conceptually many common elements between Track I and Track II of the Rules, many issues relating to Track I of the Rules had been addressed in those discussions as well.

137. The Commission further agreed that the next session of the Working Group should address the text of Track I of the Rules, should also address the issues identified in paragraph 222 of the report of the forty-sixth session of the Commission,<sup>40</sup> some of which were further addressed in document A/CN.9/WG.III/WP.125, a proposal by the Governments of Colombia, Honduras, Kenya and the United States, and should continue to achieve practical solutions to open questions.

138. The Commission recalled that at its forty-fifth session, in 2012, it had decided that the Working Group should: (a) consider and report back at a future session of the Commission on how the draft rules would respond to the needs of developing countries and those facing post-conflict situations, in particular with regard to the need for an arbitration phase to be part of the process; (b) continue to include in its deliberations the effects of online dispute resolution on consumer protection in developing and developed countries and countries in post-conflict situations, including in cases where the consumer was the respondent party in an online dispute resolution process; and (c) continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, including arbitration and possible alternatives to arbitration.<sup>41</sup>

139. The Commission further recalled that, at its forty-sixth session, in 2013, it had unanimously confirmed that decision, and reaffirmed the mandate of the Working Group in relation to low-value, high-volume transactions, encouraging the Working Group to continue to conduct its work in the most efficient manner possible.<sup>42</sup>

140. After discussion, the Commission reaffirmed its understanding of the Working Group's mandate, as expressed at the forty-fifth and forty-sixth sessions of the Commission.<sup>43</sup>

<sup>38</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, paras. 318 and 321.

<sup>39</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 257.

<sup>40</sup> *Ibid.*, *Sixty-eighth Session, Supplement No. 17 (A/68/17)*.

<sup>41</sup> *Ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 79.

<sup>42</sup> *Ibid.*, *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 222.

<sup>43</sup> *Ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, paras. 71-79; and *ibid.*, *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, paras. 218-222.

## VI. Electronic commerce: progress report of Working Group IV

141. The Commission recalled that at its forty-fourth session, in 2011, it had mandated Working Group IV (Electronic Commerce) to undertake work in the field of electronic transferable records. At its current session, the Commission had before it reports of the Working Group on its forty-eighth session (A/CN.9/797), held in Vienna from 9 to 13 December 2013, and forty-ninth session (A/CN.9/804), held in New York from 28 April to 2 May 2014. The Commission took note of the key discussions during the sessions, which were guided by the principles of functional equivalence and technological neutrality.

142. The Commission further noted that the Working Group had dedicated one half-day at each session for discussing technical assistance and coordination activities in the field of electronic commerce, which also provided an opportunity for the Working Group to be informed about recent developments in States. In that context, the Commission was informed about the coordination activities undertaken by the Secretariat, including continued cooperation with the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT), United Nations Economic and Social Commission for Asia and the Pacific (UN/ESCAP), the Asia-Pacific Economic Cooperation (APEC), the European Commission and the World Customs Organization (WCO).

143. It was further noted that the chairperson of the forty-sixth session of the Commission had given a keynote speech at the conference “Facilitating Trade in the Digital Economy — Enhancing Interaction Between Business and Government” organized by ICC (Geneva, 8-9 April 2014), which highlighted the contribution of UNCITRAL texts to facilitating the use of electronic communications at the national and international levels. In that context, support was expressed for the Commission and the Secretariat engaging closely with other organizations active in the field of electronic commerce.

144. The Commission was informed that the Russian Federation and Congo had become States parties to the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)<sup>44</sup> (the Electronic Communications Convention), which now had five States parties. The Commission urged other States to consider becoming parties to that Convention.

145. With respect to possible future work, the Commission recalled that at its forty-sixth session, in 2013, it agreed that whether work regarding electronic transferable records might extend to identity management, use of mobile devices in electronic commerce and single window facilities would be further assessed at future sessions.<sup>45</sup>

146. In that context, the Commission took note of a proposal by the Government of Canada with regard to legal issues on cloud computing (A/CN.9/823). It was explained that the proposal was intended to request the Secretariat to gather information relating to cloud computing and to prepare a document identifying potential risks from current practices in relation to conflict of laws, the lack of supporting legislative framework, and the possible disparities of domestic laws. It was also suggested that best practices could be outlined, also making reference to work done by other organizations. It was stated that such work by the Secretariat could form a basis for the Commission’s consideration of cloud computing as a possible future topic for the Working Group.

147. There was wide support for that proposal recognizing the implication of cloud computing, particularly for small- and medium-sized enterprises. However, it was suggested that caution should be taken not to engage in issues such as data protection, privacy and intellectual property, which might not easily lend themselves to harmonization and might raise questions as to whether they fell within the mandate of the Commission. It was also stressed that work already undertaken by other international organizations, for example, OECD and APEC, in this area should be taken into consideration so as to avoid any overlap and duplication of work. It was also suggested that compilation of best practices might be premature at the current stage. Subject to those comments, it was generally agreed that the

<sup>44</sup> General Assembly resolution 60/21, annex.

<sup>45</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 313.

mandate given to the Secretariat should be broad enough to enable it to gather as much information as possible for the Commission to consider cloud computing as a possible topic at a future session. It was noted that the scope of any future work would, in any case, have to be determined by the Commission at a later stage.

148. Another suggestion related to possible future work by the Working Group was that the Secretariat should continue to closely follow legislative developments in the field of identity management and authentication, particularly in respect of the recent adoption of the Regulation of the European Parliament and of the Council on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market (eIDAS). It was suggested that workshops could be organized to gather information on that topic.

149. Noting that the current work of the Working Group would greatly assist in facilitating electronic commerce in international trade, the Commission expressed its appreciation to the Working Group for the progress made in preparing draft provisions on electronic transferable records and commended the Secretariat for its work. After discussion, the Commission reaffirmed the mandate of the Working Group to develop a legislative text on electronic transferable records and requested the Secretariat to continue reporting to the Commission on relevant developments in the field of electronic commerce.

150. The Commission requested the Secretariat to compile information on cloud computing, identity management, use of mobile devices in electronic commerce and single window facilities, including by organizing, co-organizing or participating in colloquia, workshops and other meetings within available resources, and to report at a future session of the Commission.

## VII. Insolvency law: progress report of Working Group V

151. The Commission considered the reports of the Working Group on its forty-fourth session (A/CN.9/798), held in Vienna from 16 to 20 December 2013, and forty-fifth session (A/CN.9/803), held in New York from 21 to 25 April 2014, as well as the report of the colloquium (A/CN.9/815) held as part of the forty-fourth session in accordance with the decision of the Commission at its forty-sixth session to clarify how the Working Group would proceed with the enterprise group issues and other parts of its current mandate and to consider topics for possible future work, including insolvency issues specific to MSMEs.<sup>46</sup>

152. Reference was made to paragraphs 16-23 of document A/CN.9/798, in which the Working Group set forth its conclusions with respect to how the work on enterprise group issues and other parts of the current mandate should proceed. The Commission noted that the Working Group had, at its forty-fifth session, commenced consideration of enterprise group insolvency on the basis of the issues outlined in paragraph 16 of document A/CN.9/798. The Commission also noted that an open-ended informal group had been established to consider the feasibility of developing a convention on international insolvency issues and to study the issues facing States with respect to adoption of the UNCITRAL Model Law on Cross-Border Insolvency<sup>47</sup> (see A/CN.9/798, para. 19, and A/CN.9/803, para. 39 (a)).

153. Reference was made to the topic of the obligations of directors of enterprise group companies in the period approaching insolvency, as discussed in paragraph 23 of document A/CN.9/798. It was said that that topic was being considered by an informal expert group prior to Working Group activity.

154. Reference was also made to paragraphs 24-30 of document A/CN.9/798 in which the Working Group outlined its conclusions on topics for possible future work, as well as to paragraphs 12-14 of document A/CN.9/803, which referred to the insolvency of MSMEs as requested by the Commission (see para. 151 above), and to paragraph 39 (b) of that

<sup>46</sup> *Ibid.*, para. 325.

<sup>47</sup> General Assembly resolution 52/158, annex.

document which sought a mandate for work on the recognition and enforcement of insolvency-derived judgements.

155. The Commission expressed support for continuing the current work on insolvency of enterprise groups as described in paragraph 152 above with a view to bringing it to a conclusion at an early date. There was support for the suggestion that, in addition to that topic, the Working Group's other priority should be to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-derived judgements, which was said to be an important area for which no explicit guidance was contained in the UNCITRAL Model Law on Cross-Border Insolvency. The Commission approved a mandate accordingly.

156. Development of a text on insolvency of MSMEs was emphasized as being important work which, when initiated, should be coordinated as appropriate with Working Group I so as to promote consistency of UNCITRAL standards in that area. The view was expressed that that work should become Working Group V's next priority, after completion of the work outlined in paragraph 155 above.

157. It was pointed out that Working Group V had a rather full agenda already and needed to prioritise its work, and in that light there were certain matters that did not require consideration as immediate priorities. Those included the insolvency of large and complex financial institutions, and further work on financial contracts, despite the recognized need to assure that the relevant provisions of the UNCITRAL Legislative Guide on Insolvency Law,<sup>48</sup> remained consistent with current best practice and related international instruments. The Commission requested the secretariat to monitor developments at the Financial Stability Board and Unidroit.

158. Support was expressed for continued study on the feasibility of developing a convention on selected international insolvency issues (which, it was said, was grounded in the need for a treaty basis to facilitate cross-border cooperation in insolvency matters) and on exploring the potential for further adoption of the UNCITRAL Model Law on Cross-Border Insolvency. The Working Group was urged to continue its study on those topics. Regarding a convention, it was suggested that the open-ended informal group referred to in paragraph 152 above should include in its deliberations whether such an instrument would have value in encouraging States to adopt cross-border insolvency measures, which should be seen as a primary justification for a convention.

159. A note of caution was expressed regarding the setting up of informal groups, of which it was said that, though they may have certain advantages with regard to efficiency, they could be perceived by their nature as less inclusive.

## VIII. Security interests: progress report of Working Group VI

160. The Commission recalled that at its forty-sixth session, in 2013, it had confirmed its decision that Working Group VI (Security Interests) should prepare a simple, short and concise model law on secured transactions based on the recommendation of the UNCITRAL Legislative Guide on Secured Transactions<sup>49</sup> (the Secured Transactions Guide) and consistent with all texts prepared by the Commission on secured transactions.<sup>50</sup> At its current session, the Commission had before it reports of the Working Group on its twenty-fourth session (A/CN.9/796), held in Vienna from 2 to 6 December 2013, and twenty-fifth session (A/CN.9/802), held in New York from 31 March to 4 April 2014. The Commission noted that at its twenty-fourth session the Working Group had commenced its work on the draft model law and that at its twenty-fifth session the Working Group had completed the first reading of the draft model law. The Commission further took note of the key decisions made during the two sessions.

<sup>48</sup> United Nations publication, Sales No. E.05.V.10.

<sup>49</sup> United Nations publication, Sales No. E.09.V.12.

<sup>50</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, paras. 194 and 332.

161. The Commission also recalled that at its forty-sixth session, in 2013, it had agreed that whether the draft model law should include provisions on security interests in non-intermediated securities would be assessed at a future time.<sup>51</sup> To facilitate consideration of the issue by the Commission, the Working Group, at its twenty-fifth session, considered a set of definitions and draft provisions dealing with non-intermediated securities and decided to recommend to the Commission that security rights in non-intermediated securities should be addressed in the draft model law (see A/CN.9/802, para. 93). The Commission had before it a note by the Secretariat entitled “Draft Model Law on Secured Transactions: Security Interests in Non-Intermediated Securities” (A/CN.9/811), which included the definitions and draft provisions to be included in the draft model law as had been agreed by the Working Group.

162. It was stated that, while non-intermediated securities were an important source of credit for businesses, particularly small- and medium-sized enterprises, security interests in non-intermediated securities had not been addressed in the Unidroit Convention on Substantive Rules for Intermediated Securities,<sup>52</sup> the Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary<sup>53</sup> or the Secured Transactions Guide. Therefore, it was widely agreed that there was great benefit in including the definitions and draft provisions on non-intermediated securities in the draft model law.

163. Acknowledging the importance of modern secured transactions law for the availability and cost of credit and the need for urgent guidance to States, in particular those with developing economies and economies in transition, the Commission expressed its satisfaction for the considerable progress achieved by the Working Group in its work. The Commission thus requested the Working Group to expedite its work so as to complete the draft model law, including the definitions and provisions on non-intermediated securities, and to submit it to the Commission for adoption together with a guide to enactment as soon as possible.

## IX. Technical assistance to law reform

164. The Commission had before it a note by the Secretariat (A/CN.9/818) describing technical cooperation and assistance activities. The Commission stressed the importance of such activities and expressed its appreciation for the related work undertaken by the Secretariat.

165. The Commission noted that the continuing ability to respond to requests from States and regional organizations for technical cooperation and assistance activities was dependent upon the availability of funds to meet associated costs. The Commission further noted that, despite efforts by the Secretariat to solicit new donations, funds available in the UNCITRAL Trust Fund for Symposia were very limited. Accordingly, requests for technical cooperation and assistance activities continued to be very carefully considered, and the number of such activities, which of late had mostly been carried out on a cost-share or no-cost basis, was limited. The Commission requested the Secretariat to continue exploring alternative sources of extrabudgetary funding, in particular by more extensively engaging permanent missions, as well as other possible partners in the public and private sectors. The Commission also encouraged the Secretariat to seek cooperation and partnership with international organizations, including through regional offices, and bilateral assistance providers in the provision of technical assistance, and appealed to all States, international organizations and other interested entities to facilitate such cooperation and take any other initiative to maximize the use of relevant UNCITRAL standards in law reform.

166. The Commission welcomed the Secretariat’s efforts to expand cooperation with the Government of the Republic of Korea on the APEC Ease of Doing Business project in the area of enforcing contracts, to other areas and with other APEC member economies. Support was expressed for the Secretariat’s aim to cooperate more closely with APEC and its

<sup>51</sup> *Ibid.*, para. 332.

<sup>52</sup> Available from [www.unidroit.org/english/conventions/2009intermediatedsecurities/convention.pdf](http://www.unidroit.org/english/conventions/2009intermediatedsecurities/convention.pdf).

<sup>53</sup> Available from [www.hcch.net/index\\_en.php?act=conventions.text&cid=72](http://www.hcch.net/index_en.php?act=conventions.text&cid=72).

member economies to improve the business environment in the Asia-Pacific region and to promote UNCITRAL texts.

167. The Commission reiterated its appeal to all States, international organizations and other interested entities to consider making contributions to the UNCITRAL Trust Fund for Symposia, if possible in the form of multi-year contributions or as specific-purpose contributions, in order to facilitate planning and enable the Secretariat to meet the increasing number of requests from developing countries and countries with economies in transition for technical cooperation and assistance activities. The Commission expressed its appreciation to the Government of the Republic of Korea, through its Ministry of Justice, and to the Government of Indonesia for their contributions to the Trust Fund since the Commission's forty-sixth session and to organizations that had contributed to the programme by providing funds or by hosting seminars.

168. The Commission appealed to the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the trust fund established to provide travel assistance to developing countries that were members of the Commission. The Commission expressed its appreciation to Austria for contributing to the UNCITRAL Trust Fund since the Commission's forty-sixth session, thereby enabling travel assistance to be granted to developing countries that were members of UNCITRAL.

169. Having heard that questions were occasionally raised, particularly in the context of cost-cutting exercises conducted in the Secretariat, as to the existence of a general mandate for the Commission to undertake technical assistance activities, the Commission was unanimous in affirming the existence of that general mandate, as stemming from numerous resolutions of the General Assembly, since its establishing resolution 2205 (XXI) of 17 December 1966 created the Commission to "further the progressive harmonization and unification of the law of international trade by: [...] (b) Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws; (c) Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field; (d) Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade; [...] (h) Taking any other action it may deem useful to fulfil its functions". The Commission expressed its unanimous understanding that the sustained ability to fulfil its technical assistance mandate through its secretariat was essential to facilitate the adoption of UNCITRAL texts, in particular in developing countries and in countries that were less familiar with the work of the Commission.

## **X. Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts**

170. The Commission, considering document A/CN.9/810, expressed its continuing belief that CLOUT and the digests were an important tool for promoting uniform interpretation and application of UNCITRAL texts. The Commission noted with appreciation that, in addition to the New York Convention, an increasing number of UNCITRAL texts were represented in CLOUT. They are as follows:

- Convention on the Limitation Period in the International Sale of Goods (New York, 1974)<sup>54</sup> and Convention on the Limitation Period in the International Sale of Goods as amended by the Protocol of 11 April 1980 (Vienna)<sup>55</sup>
- United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978)<sup>56</sup>
- United Nations Sales Convention

<sup>54</sup> United Nations, *Treaty Series*, vol. 1511, No. 26119.

<sup>55</sup> *Ibid.*, vol. 1511, No. 26121.

<sup>56</sup> *Ibid.*, vol. 1695, No. 29215.

- United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995)<sup>57</sup>
- Electronic Communications Convention
- UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006<sup>58</sup>
- UNCITRAL Model Law on International Credit Transfers (1992)<sup>59</sup>
- UNCITRAL Model Law on Electronic Commerce, 1996<sup>60</sup>
- UNCITRAL Model Law on Cross-Border Insolvency

171. The Commission further noted with satisfaction that as of 5 May 2014, 143 issues of compiled case-law abstracts had been published, dealing with 1,351 cases from all regions of the world.

172. The Commission was informed that the network of national correspondents had maintained its composition of 64 national correspondents representing 31 States. Noting the important role of national correspondents both in collecting case law and preparing abstracts, the Commission invited those States that had not yet appointed national correspondents to do so.

173. The Commission commended the Secretariat for promoting the *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (2012) (the CISG Digest) and the *UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration* (the MAL Digest) through various means. It further noted with satisfaction the translation of the third revision of the CISG Digest, published in English 2012, in all United Nations official languages. The Commission was further informed of progress of preparation of the digest of case law on the UNCITRAL Model Law on Cross-Border Insolvency and work to update the current version of the MAL Digest. The Commission requested the Secretariat to continue preparing and publishing, including through electronic means, digests of case law relating to UNCITRAL texts in as many official languages as possible and to ensure that those digests were broadly disseminated to Governments and other interested bodies.

174. The Commission took note with appreciation of the performance of the website [www.newyorkconvention1958.org](http://www.newyorkconvention1958.org), which was launched in 2012 to make publicly available information collected in the preparation of the UNCITRAL Secretariat Guide on the New York Convention (see para. 112 above).

175. The Commission also noted with appreciation that work undertaken to upgrade the UNCITRAL website ([www.uncitral.org](http://www.uncitral.org)) to facilitate the functioning of the CLOUT database was progressing. In that context, it was suggested to consider the use of social media as a means to promote the use of the CLOUT database and the UNCITRAL website.

176. The Commission, as in the previous sessions, commended the Secretariat for its work on CLOUT, acknowledged the resource-intensive nature of the system and the need for further resources to sustain it. The Commission thus reiterated its appeal to States to assist the Secretariat in the search for available funding sources to ensure proper maintenance and development of CLOUT.<sup>61</sup>

<sup>57</sup> United Nations, *Treaty Series*, vol. 2169, No. 38030, p. 163.

<sup>58</sup> *Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, annex I; and *ibid.*, *Sixty-first Session, Supplement No. 17 (A/61/17)*, annex I.

<sup>59</sup> *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17 (A/47/17)*, annex I.

<sup>60</sup> General Assembly resolution 51/162, annex.

<sup>61</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 240.



## XI. Status and promotion of UNCITRAL texts

177. The Commission considered the status of the conventions and model laws emanating from its work and the status of the New York Convention, on the basis of a note by the Secretariat (A/CN.9/806). The Commission noted with appreciation the information on treaty actions and legislative enactments received since its forty-sixth session.

178. The Commission also noted the following actions made known to the Secretariat subsequent to the submission of the Secretariat's note:

- (a) the New York Convention — accession by Burundi (150 States parties); and
- (b) United Nations Sales Convention — accession by Congo (81 States parties).

179. The Commission approved the planned future work by the Secretariat to further promote the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the Rotterdam Rules)<sup>62</sup> through the preparation of an accession kit designed to assist States with the ratification of or accession to the Convention, without any bearing on the interpretation of the Convention. The Commission requested the Secretariat to publish the accession kit, including electronically and in the six official languages of the United Nations, and to disseminate it to Governments and other interested bodies.

180. Considering the broader impact of UNCITRAL's texts, the Commission took note of the bibliography of recent writings related to the work of UNCITRAL (A/CN.9/805) and noted with appreciation the increased influence of UNCITRAL legislative guides, practice guides and contractual texts. To facilitate a comprehensive approach to the creation of the bibliography and to further the understanding of the influence of UNCITRAL texts, the Commission called on non-governmental organizations, in particular those invited to the Commission, to donate copies of their journals, annual reports and other publications to the UNCITRAL Law Library for review. In this regard, the Commission expressed appreciation to the Ljubljana Arbitration Centre for its donation of current and forthcoming issues of the *Slovenian Arbitration Review* and to the Eötvös Loránd University Faculty of Law for its donation of current and forthcoming issues of the *ELTE Law Journal*.

181. The important role played by the UNCITRAL website ([www.uncitral.org](http://www.uncitral.org)) in promotion and dissemination of information about UNCITRAL, its texts and its publications was highlighted and the Commission expressed its approval for the sound management of the website by the Secretariat to maintain the high standards. Recalling the General Assembly resolutions commending the website's six-language interface,<sup>63</sup> the Commission requested the Secretariat to continue to provide, via the website, UNCITRAL texts, publications, and related information, in a timely manner and in the six official languages of the United Nations. (As related to the functioning of the UNCITRAL website, see also para. 175 above.)

## XII. Coordination and cooperation

### A. General

182. The Commission, having before it document A/CN.9/809, noted with appreciation that since its forty-sixth session, in 2013, the Secretariat had maintained a sustained involvement in initiatives of other organizations active in the field of international trade both within and outside the United Nations system. Among others, the Secretariat had participated in the activities of the following organizations: the UN/CEFACT, the United Nations Conference on Trade and Development, the United Nations Economic Commission for Europe, the United Nations Environment Programme, the United Nations Inter-Agency Cluster on Trade and Productive Capacity, the Hague Conference, OECD, Unidroit, the World Bank and the World Trade Organization.

<sup>62</sup> General Assembly resolution 63/122, annex.

<sup>63</sup> General Assembly resolutions 61/32, para. 17, 62/64, para. 16, and 63/120, para. 20.

183. By way of example of current efforts, the Commission took note with satisfaction of the coordination activities involving the Hague Conference and Unidroit as well as the activities on the rule of law in those areas of work of the United Nations and other entities that were of relevance to the work of UNCITRAL.

184. The Commission noted that the Secretariat participated in expert groups, working groups and plenary meetings of other organizations with the purpose of sharing information and expertise and avoiding duplication of work in the resultant work products. The Commission further observed that coordination work often involved travel to meetings of those organizations and the expenditure of funds allocated for official travel. The Commission reiterated the importance of such work being undertaken by UNCITRAL as the core legal body in the United Nations system in the field of international trade law and supported the use of travel funds for that purpose.

## **B. Coordination and cooperation in the field of security interests**

185. Recalling the mandate it had given to the Secretariat at its forty-fourth session, in 2011,<sup>64</sup> the Commission noted with appreciation the efforts of the Secretariat to coordinate with the World Bank in preparing a revised version of the World Bank Insolvency and Creditor Rights Standard (the “ICR Standard”) on the basis of the World Bank Principles for Effective Insolvency & Creditor Rights Systems<sup>65</sup> (the “Principles”) revised to incorporate the key recommendations of the Secured Transactions Guide, and to make reference to the UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property (2010)<sup>66</sup> and to the UNCITRAL Guide on the Implementation of a Security Rights Registry (2013).<sup>67</sup>

186. The Commission was informed by the representative of the World Bank that the special Working Group on Security Interests designated by the World Bank’s Global Task Force on Effective Insolvency and Debtor/Creditor Regimes (the “Task Force”) to examine and update the Principles had completed its work. It was further noted that the report and recommendation of that special Working Group would be reviewed by the Task Force at its meeting in October 2014 and posted for public comment, after which the Task Force would determine the best way of integrating the revised Principles into the ICR Standard. The Secretariat was requested by the World Bank to continue participating in that process.

187. It was widely felt that such coordination effort was important and should continue in an expeditious manner. Thus, the Commission renewed its mandate to the Secretariat to continue to coordinate with the World Bank and to finalize a revised version of the ICR Standard that would be consistent with relevant UNCITRAL texts.

188. Recalling its decision at its forty-sixth session, in 2013, to request the Secretariat to engage in discussions with the European Commission to ensure a coordinated approach to the issue of the law applicable to third-party effects of assignments of receivables,<sup>68</sup> the Commission was informed of the efforts made by the Secretariat in that respect. In that context, the Commission reiterated its call to the European Commission to ensure a coordinated approach in line with all the texts of UNCITRAL on security interests and renewed the mandate it had given to the Secretariat to cooperate with the European Commission to ensure such a coordinated approach.

189. The Commission took note of a statement by the Unidroit representative on the status of the Convention on International Interests in Mobile Equipment (the Cape Town

<sup>64</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 228.

<sup>65</sup> Available from <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTGILD/0,,contentMDK:22095859~menuPK:64874173~pagePK:4789622~piPK:64873779~theSitePK:5807555,00.html>.

<sup>66</sup> Available from [www.uncitral.org/uncitral/uncitral\\_texts/security.html](http://www.uncitral.org/uncitral/uncitral_texts/security.html).

<sup>67</sup> *Ibid.*

<sup>68</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 249.

Convention) and its protocols.<sup>69</sup> In that context, the Commission was informed that Unidroit was in the process of considering the preparation of a new protocol to the Cape Town Convention on mining, agricultural and construction equipment (the “MAC Protocol”) through a study group that is expected to meet in December 2014. It was widely felt that while the Cape Town Convention and its protocols provided a separate international regime for certain types of mobile equipment, coordination between the MAC Protocol and all the texts of UNCITRAL on security interests was extremely important in order to avoid any overlap or conflict with existing work. It was noted that if the scope of the MAC Protocol were to follow the approach of the Cape Town Convention and be limited to equipment of high value, crossing national borders in the course of its normal use, and typically being subject to asset-based registration, the MAC Protocol would be compatible with the comprehensive approach taken in the Secured Transactions Guide. After discussion, the Commission renewed its mandate given to the Secretariat to cooperate with Unidroit, particularly in the area of security interests.

190. The Commission also welcomed and expressed support for the cooperation and coordination with the International Financial Corporation (IFC) or any other entity resulting from the recent restructuring of the World Bank Group with respect to technical assistance to law reform and with OAS with respect to local capacity-building in the area of security interests.

### C. Reports of other international organizations

191. The Commission took note of statements made on behalf of the following international and regional organizations: Unidroit, OAS, IMO, World Bank, IDLO and OHCHR. A summary of their statements is reproduced below.

#### 1. Unidroit

192. The Secretary-General of Unidroit reported on the main activities of Unidroit since the forty-sixth session of UNCITRAL, in 2013. The Commission was in particular informed that:

(a) **Preparation of legal guide on contract farming** in cooperation with interested international organizations, in particular the Food and Agriculture Organization of the United Nations (FAO), the International Fund for Agricultural Development (IFAD) and the World Food Programme (WFP), continued. With the assistance of the Unidroit secretariat, the experts were currently revising the guide, with a view to complete review of the draft guide at the fourth and final meeting of the Unidroit working group to be held in mid-November 2014. Before that meeting, the Unidroit secretariat would circulate the draft to international organizations, farmers, industry representatives and scholars, and the comments received would be before the working group. The final deliberations of the working group would also be informed by discussions at four consultation events organized in the course of 2014 with the view of presenting the content of the draft guide to audiences of farmers’ representatives, industry stakeholders, interested Governments and intergovernmental and non-governmental organizations, and seeking feedback on its adequacy to meet their practical needs. After that final meeting of the working group, the guide would undergo pre-publication editing and translation into French as well as the required FAO procedures, before being submitted to the Unidroit Governing Council for approval, at its ninety-fourth session, in 2015. Once finalised, the guide was expected to be issued as a joint FAO/Unidroit instrument, which the partner organizations would use in the framework of their technical assistance and capacity-building programmes in developing countries;

(b) In 2014, the Unidroit Governing Council decided to take a first initial step towards a **fourth edition of the Unidroit Principles of International Commercial Contracts**.<sup>70</sup> It instructed the Unidroit secretariat to set up a restricted Steering Committee

<sup>69</sup> Available from [www.unidroit.org/instruments/security-interests/cape-town-convention](http://www.unidroit.org/instruments/security-interests/cape-town-convention).

<sup>70</sup> The current and earlier editions of the Principles are available from [www.unidroit.org/publications/513-unidroit-principles-of-international-commercial-contracts](http://www.unidroit.org/publications/513-unidroit-principles-of-international-commercial-contracts).

for the purpose of formulating specific proposals for appropriate amendments and additions to the rules and comments of the Unidroit Principles to address particular issues raised by **long-term contracts**. The Steering Committee was expected to meet in January 2015. The first reading of the draft by the Unidroit Council was expected at its ninety-fourth session in 2015;

(c) The **Cape Town Convention** currently had 60 States Parties; the Aircraft Protocol to the Cape Town Convention continued to attract new accessions; the International Registry for aircraft objects was expanding exponentially, in terms of the proportion of the world's commercial aircraft financing transactions recorded in the registry; the Rail Protocol had six signatories and one State Party and the negotiations with the bidder selected to operate the International Registry for railway rolling stock had been successfully completed. As regards the Space Protocol, the Preparatory Commission, established pursuant to Resolution 1 of the Diplomatic Conference, met in Rome on 6 and 7 May 2013, and again on 27 and 28 February 2014, and would hold its third session in September 2014 to consider a first draft of the Registry Regulations and the process for selecting the registrar. The International Telecommunication Union (ITU) accepted to join the Preparatory Commission, and its secretariat confirmed its interest in becoming the Supervisory Authority. The Unidroit Governing Council agreed to set up a study group to consider the feasibility of future work on a possible fourth protocol to the Cape Town Convention (the MAC Protocol) (see also para. 189 above). The first meeting of the study group would take place in Rome, on 15-17 December 2014;

(d) In 2013 Unidroit and the European Law Institute (ELI) agreed to conduct a joint project aimed at developing **model rules of civil procedure tailored for the European context** and taking into account, in particular, the European *acquis*. The first joint ELI/Unidroit workshop, in cooperation with the American Law Institute (ALI), was held in Vienna on 18 and 19 October 2013. In 2014, Unidroit and ELI set up a Steering Committee, which met on 12-13 May 2014 in Rome and agreed on the composition of the working groups for each topic chosen at the 2013 workshop (service and information; interim measures; evidence). Those working groups would hold a joint meeting, with the participation of a representative of ALI, in November 2014 in Rome. A final report on the feasibility of formulating European model rules of civil procedure on the basis of the ALI/Unidroit Principles of Transnational Civil Procedure<sup>71</sup> (the ALI/Unidroit Principles) and a list of topics to be covered by future rules were expected to be completed by 2015. The project might represent a first attempt towards the development of other regional projects adapting the ALI/Unidroit Principles to the specificities of regional legal cultures, leading the way to the drafting of other regional rules.

## 2. OAS

193. A representative of OAS referred to the long-standing history of the relationship between the OAS and UNCITRAL and informed about current areas of work in private international law undertaken in OAS by its political organs (the General Assembly, the Permanent Council and the Committee on Juridical and Political Affairs (CAJP)), secretariat, InterAmerican Juridical Committee and specialized conferences (CIDIP). The Commission was in particular informed that:

(a) Under the *Inter-American Program for the Development of International Law*, OAS implemented two technical cooperation projects in the field of private international law of particular relevance to UNCITRAL: (i) "*Commercial Arbitration: Training Judicial Agents in the Enforcement of International Awards*", with its key objective to promote, among judges and other public officials, knowledge and correct application of the regional and global legal instruments in the area of international commercial arbitration; and (ii) "*Reform of the Secured Transaction Regime in the Americas*", with its key objective to

<sup>71</sup> Prepared by a joint ALI/Unidroit Study Group and adopted in 2004 by the Unidroit Governing Council, aimed at reconciling the differences among various national rules of civil procedure, taking into account the peculiarities of transnational disputes as compared to purely domestic ones. They were accompanied by a set of "Rules of Transnational Civil Procedure", which were not formally adopted by either Unidroit or ALI, but constituted "the Reporters' model implementation of the Principles, providing greater detail and illustrating concrete fulfilment of the Principles".

improve the capacity of OAS member States to implement the necessary reforms that will create a modern and effective secured transactions regime;

(b) Among the topics recently studied by the InterAmerican Juridical Committee, three were of relevance to the work of UNCITRAL: (i) Simplified Stock Corporations (relevant to the current work of UNCITRAL Working Group I); (ii) Electronic Warehouse Receipts for Agricultural Products (relevant to the current work by UNCITRAL Working Group IV); and (iii) the InterAmerican Convention on the Law Applicable to International Contracts;

(c) The OAS Secretariat, through its Department of International Law, had been specifically instructed “to promote among member states further development of private international law, in collaboration with agencies and organizations engaged in this area, among them UNCITRAL, the Hague Conference on Private International Law, and the American Association of Private International Law.”<sup>72</sup>

194. The representative of OAS expressed appreciation for assistance received from the UNCITRAL secretariat with the implementation of the technical cooperation project in the area of secured transactions, for participation of UNCITRAL in the work of CIDIP and for other collaborative initiatives with UNCITRAL. Benefits of continuing cooperation between UNCITRAL and OAS for States, the organizations concerns and their secretariats were highlighted.

### **3. IMO**

195. A representative of IMO informed that the 2014 World Maritime Day would be celebrated under the theme “IMO conventions: effective implementation”. Reference was made to a number of IMO treaty instruments and amendments thereto (in force and not yet in force). In light of their relevance to seaborne trade, these instruments were considered relevant to the work of UNCITRAL. The importance of States ratifying, acceding to, accepting or approving those instruments was highlighted. In that context, IMO informed about its depository and other functions with respect to those instruments, including advice and assistance that it provided to States in connection with the accession to those instruments and with their subsequent implementation.

### **4. World Bank**

196. The Chief Counsel, Legal Vice Presidency, of the World Bank expressed support for an enhanced cooperation and coordination between UNCITRAL and the World Bank and other development institutions. UNCITRAL’s work was viewed by the World Bank as directly relevant to the development agenda, especially in a world where markets and capital flows were increasingly global in nature. UNCITRAL standards and work in the areas of insolvency law and security interests were noted as particularly responsive to immediate needs for commercial law reforms in those areas in developing countries. Other areas of UNCITRAL’s work of relevance to the World Bank’s development assistance work and where close cooperation and coordination between UNCITRAL and the World Bank would therefore be welcome were settlement of commercial disputes, electronic commerce, public procurement and MSMEs. The area of public-private partnerships was also mentioned as relevant to the work of the World Bank in developing countries.

197. Appreciation was expressed for the active participation by the UNCITRAL secretariat in the World Bank’s Global Forum on Law Justice and Development ([www.globalforumljd.org](http://www.globalforumljd.org)), and for the guidance that UNCITRAL has provided to various communities of practice within the Forum. (See also paras. 185-187 above.)

### **5. IDLO**

198. The Commission took note of a report of IDLO on an enhanced cooperation achieved with the UNCITRAL secretariat over last year, in particular though mutual participation in events intended to expand States’ appreciation of the contribution of the law to development. The role of the rule of law — the basic cause that IDLO and UNCITRAL shared — to the

<sup>72</sup> OAS General Assembly resolution 2852, para. 12.

effort to level the playing field for economic actors, promote the growth of entrepreneurship and MSMEs and to sustain development was highlighted.

## 6. OHCHR

199. The Commission was informed about the mandate and the work of the United Nations Working Group on Business and Human Rights. Established by the United Nations Human Rights Council in 2011, it was extended for another three years by the Council at its twenty-sixth session, in June 2014. The Working Group's current mandate was to promote the effective implementation of the Guiding Principles on Business and Human Rights<sup>73</sup> and to explore options and make recommendations to strengthen the protection against business-related human rights abuses. The Working Group is advocating for the development of national action plans on business and human rights as a means to facilitate a stock-taking of current gaps in laws and regulations and to formulate clear road maps to address such gaps.

200. The work of UNCITRAL in promoting the rule of law in commercial relations, in particular through its standards in the areas of transparency in investor-State arbitration and public procurement, was seen by the Working Group to be of high relevance to the effective protection of human rights and thus to the work of the Working Group on Business and Human Rights. Given its technical expertise on the issue of corporate and trade law, UNCITRAL was considered ideally placed to work together with the Working Group in ensuring that human rights norms and standards inform law-making related to trade and investment at the national level. As the Working Group was developing guidance for national action plans, it would like to seek the support and collaboration of the UNCITRAL secretariat to explore opportunities for collaboration.

## 7. Concluding statements in the Commission

201. The Commission took note of an oral report of the Secretariat on a joint project between the UNCITRAL secretariat and OECD aimed at promoting the culture of commercial and investment arbitration in the Middle East and North Africa (MENA) region.

202. The Commission expressed appreciation for the statements made and noted the high level of cooperation that already existed between UNCITRAL (and its secretariat) and other international organizations active in the field of international trade law. It encouraged its secretariat to look for synergies and to capitalize on those existing by implementing joint projects. This was considered essential in order to avoid duplication and achieve more efficient use of scarce resources available to the UNCITRAL secretariat and those organizations. Particular importance was attached to developing partnerships with regional organizations in light of the capacity of those organizations to better reach out to their member States and disseminate among them information about UNCITRAL and its standards.

203. The importance of joint projects of the OAS, the World Bank and UNCITRAL in the area of security interests for countries in the Latin American and Caribbean region was particularly highlighted as was also highlighted the need for a closer and more substantive cooperation with the Hague Conference and Unidroit. It was noted that joint projects with Unidroit were not yet implemented because topics on the current work programmes of both institutions did not currently lend themselves to such cooperation. The conviction was expressed that it was worth considering implementing UNCITRAL-Unidroit joint projects once appropriate topics appeared.

204. As regards calls by the OHCHR for the support and collaboration of the UNCITRAL secretariat in the current project of the Working Group on Business and Human Rights (see paras. 199-200 above), the Commission agreed with a suggestion that the UNCITRAL secretariat should monitor developments in the area of business and human rights, in cooperation with relevant bodies within the United Nations and beyond and inform the Commission about developments of relevance to UNCITRAL work.

<sup>73</sup> Available from [www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

#### **D. International governmental and non-governmental organizations invited to sessions of UNCITRAL and its Working Groups**

205. At its current session, the Commission recalled that, at its forty-third session, in 2010, it had adopted the summary of conclusions on UNCITRAL rules of procedure and methods of work.<sup>74</sup> In paragraph 9 of the summary, the Commission had decided to draw up and update as necessary a list of international organizations and non-governmental organizations with which UNCITRAL had long-standing cooperation and which had been invited to sessions of the Commission. The Commission also recalled that, further to its request,<sup>75</sup> the Secretariat had adjusted the online presentation of information concerning intergovernmental and non-governmental organizations invited to sessions of UNCITRAL and its working groups and the modality of communicating such information to States, and the adjustments made were to the satisfaction of the Commission.<sup>76</sup>

206. The Commission took note that since its forty-sixth session, in 2013, the following organizations had been added in the list of non-governmental organizations invited to UNCITRAL sessions: the African Center for Cyberlaw and Cybercrime Prevention (ACCP; <http://cybercrime-fr.org/index.pl/accp>); the German Institution of Arbitration (DIS; [www.dis-arb.de](http://www.dis-arb.de)); the International Mediation Institute (IMI; [www.imimmediation.org](http://www.imimmediation.org)); and the Jerusalem Arbitration Center (JAC; [www.jac-adr.org](http://www.jac-adr.org)). The Commission also took note that the following organization had been removed from that list because of its dissolution as announced on its website: Global Business Dialogue on e-Society (GBDe; [www.gbd-e.org](http://www.gbd-e.org)).

207. The Commission also took note that, pursuant to General Assembly resolution 68/106, paragraph 8, all States and invited organizations were reminded, when they were invited to UNCITRAL sessions, about rules of procedure and work methods of UNCITRAL. Such a reminder is effectuated by inclusion in invitations issued to them of a reference to a dedicated web page of the UNCITRAL website where main official documents of UNCITRAL pertaining to its rules of procedure and work methods could be easily accessed.

### **XIII. UNCITRAL regional presence**

208. The Commission heard an oral report on the activities undertaken by the UNCITRAL Regional Centre for Asia and the Pacific subsequent to the date of the report on that topic to the Commission at its forty-sixth session in 2013 and based on the written report submitted to the Commission (A/CN.9/808).

209. The Commission stressed the importance of the mandate assigned to the Regional Centre for Asia and the Pacific and expressed its appreciation and support for the activities undertaken by that Centre, underlining its importance in enhancing regional contributions to the work of UNCITRAL.

210. The Commission acknowledged with gratitude the contribution of the Government of the Republic of Korea to the Regional Centre for Asia and the Pacific as well as that of the other contributors, in kind or financially, to specific activities of that Regional Centre.

211. Appreciation was expressed, in particular, for the various activities undertaken by the Regional Centre and aimed at longer-term capacity-building such as the joint programme established with the Beijing Normal University on teaching and researching electronic commerce law.

212. The importance of the Regional Centre as a channel of communication between States in the region and UNCITRAL was also stressed. In that regard, it was suggested that States in the region could each designate a focal point for matters related to UNCITRAL topics and in charge of coordinating with the Regional Centre.

<sup>74</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17), annex III.*

<sup>75</sup> *Ibid., Sixty-sixth Session, Supplement No. 17 (A/66/17), paras. 288-298.*

<sup>76</sup> *Ibid., Sixty-seventh Session, Supplement No. 17 (A/67/17), paras. 176-178.*

213. Reference was made to the close cooperation with the host country of the Regional Centre, the Republic of Korea, and in particular its Ministry of Justice, namely by the joint organization of several regional conferences and technical assistance initiatives, such as the Conference on “Enabling Environment for Microbusiness and Creative Economy” and the Second Annual Arbitration Asia-Pacific Conference. The Government of the Republic of Korea reiterated its continuous support to the activities of the Regional Centre.

214. The Commission reiterated that, in light of the importance of a regional presence for raising awareness of UNCITRAL’s work and, in particular, for promoting the adoption and uniform interpretation of UNCITRAL texts, further efforts should be made to emulate the example of the Regional Centre for Asia and the Pacific in other regions. The Secretariat was mandated to pursue consultations regarding the possible establishment of other UNCITRAL regional centres.

## **XIV. Role of UNCITRAL in promoting the rule of law at the national and international levels**

### **A. Introduction**

215. The Commission recalled that the item on the role of UNCITRAL in promoting the rule of law at the national and international levels had been on the agenda of the Commission since its forty-first session, in 2008,<sup>77</sup> in response to the General Assembly’s invitation to the Commission to comment, in its report to the General Assembly, on the Commission’s current role in promoting the rule of law.<sup>78</sup> The Commission further recalled that since that session, the Commission, in its annual reports to the General Assembly, had transmitted comments on its role in promoting the rule of law at the national and international levels, including in the context of post-conflict reconstruction. It expressed its conviction that the promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international levels, including through the Rule of Law Coordination and Resource Group<sup>79</sup> supported by the Rule of Law Unit in the Executive Office of the Secretary-General.<sup>80</sup> The Commission noted with satisfaction that that view had been endorsed by the General Assembly.<sup>81</sup>

216. At its current session, the Commission heard an oral report by the chairperson of its forty-sixth session and by the Secretariat on the implementation of the relevant decisions taken by the Commission at its forty-sixth session.<sup>82</sup> A summary of the reports is contained in section B below.

217. The Commission recalled that at its forty-third session, in 2010, it had indicated that it considered it essential to maintain a regular dialogue with the Rule of Law Coordination and Resource Group through the Rule of Law Unit and to keep abreast of progress made in the integration of the work of UNCITRAL into United Nations joint rule of law activities. To that end, it had requested the Secretariat to organize briefings by the Rule of Law Unit every other year, when sessions of the Commission were held in New York.<sup>83</sup> Consequently,

<sup>77</sup> For the decision of the Commission to include the item on its agenda, see *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, part two, paras. 111-113.

<sup>78</sup> General Assembly resolutions 62/70, para. 3; 63/128, para. 7; 64/116, para. 9; 65/32, para. 10; 66/102, para. 12; and 67/97, para. 14.

<sup>79</sup> [www.unrol.org/article.aspx?article\\_id=6](http://www.unrol.org/article.aspx?article_id=6).

<sup>80</sup> *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 386; *ibid.*, *Sixty-fourth Session, Supplement No. 17 (A/64/17)*, paras. 413-419; *ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, paras. 313-336; *ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, paras. 299-321; *ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, paras. 195-227; and *ibid.*, *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, paras. 267-291.

<sup>81</sup> Resolutions 63/120, para. 11; 64/111, para. 14; 65/21, paras. 12-14; 66/94, paras. 15-17; 67/89, paras. 16-18; and 68/106, para. 12.

<sup>82</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, paras. 273 and 275.

<sup>83</sup> *Ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 335.



a briefing had taken place at the Commission's forty-fifth session in New York in 2012,<sup>84</sup> and at the current session, the Commission had a briefing by the Rule of Law Unit. Its summary is contained in section C below.

218. The Commission also took note of General Assembly resolution 68/116 on the rule of law at the national and international levels, by paragraph 14 of which the General Assembly invited the Commission to continue to comment, in its reports to the General Assembly, on its current role in promoting the rule of law. Recalling its deliberations at its forty-sixth session,<sup>85</sup> the Commission welcomed a panel discussion on "Sharing States' national practices in strengthening the rule of law through access to justice". A summary of the panel discussion and comments of the Commission on its role in promoting the rule of law by facilitating access to justice are contained in section D below.

219. The Commission recalled that in conjunction with the approval of the draft convention on transparency at the current session (see para. 106 above), a statement on UNCITRAL's role in promoting the rule of law in commercial relations was delivered by Ms. Irene Khan, Director-General of IDLO. In that statement, Ms. Khan in particular emphasized the role of UNCITRAL standards and tools in the promotion of transparency, accountability and access to information and the importance of those issues especially in the context of investor-State relations. The Commission expressed appreciation for the statement and support for enhanced collaboration with IDLO on promotion of the rule of law in commercial relations.

## **B. Reports on the implementation of the relevant decisions taken by the Commission at its forty-sixth session**

220. The chairperson of UNCITRAL's forty-sixth session reported that he had spoken at the eighth session of the Open Working Group (New York, 3-7 February 2014),<sup>86</sup> in which he conveyed to the Group that a sound regulatory framework for businesses, investment and trade was a powerful driving force in addressing such sustainable development challenges as joblessness, youth unemployment and the shortcomings of a large informal economy. The existence of such a framework largely conditioned the contribution of the private sector to sustainable development. Increasing attention by States to the commercial law area should thus be regarded as one of important transformative changes that should come clearly across in any post-2015 development agenda.

221. The Commission also heard that the UNCITRAL secretariat, in cooperation with the Asian-African Legal Consultative Organization (AALCO), IDLO and ICC, organized a side event on the margins of the eighth session of the Open Working Group on the enabling environment for rule-based business, investment and trade (New York, 6 February 2014).<sup>87</sup> The side event focused on the establishment of enabling environments for rule-based business, investment and trade as critical elements for conflict prevention, post-conflict reconstruction and the promotion of rule of law and governance in commercial relations.

222. The Commission took note that a draft guidance note of the Secretary-General on the promotion of the rule of law in commercial relations, about which the Commission was informed at its forty-sixth session, in 2013,<sup>88</sup> was presented by the Office of Legal Affairs of the United Nations Secretariat at the expert level meeting of the Rule of Law Coordination and Resource Group of the United Nations on 20 December 2013. It was noted that the text, which was made available to the Commission for information purposes was currently

<sup>84</sup> *Ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, paras. 195-227.

<sup>85</sup> *Ibid.*, *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 291.

<sup>86</sup> The statement by the chairperson of UNCITRAL's forty-sixth session, Mr. Michael Schoell, is available at <http://sustainabledevelopment.un.org/owg8.html>, under "Statements & Presentations", and on the UNCITRAL website ([www.uncitral.org/pdf/english/whats\\_new/2014\\_02/UNCITRAL-OWG-statement.pdf](http://www.uncitral.org/pdf/english/whats_new/2014_02/UNCITRAL-OWG-statement.pdf)).

<sup>87</sup> Information about the side event may be found at <http://sustainabledevelopment.un.org/owg8.html> and on the UNCITRAL website ([www.uncitral.org/uncitral/en/about/whats\\_new\\_archive.html](http://www.uncitral.org/uncitral/en/about/whats_new_archive.html), 29/01/2014 entry).

<sup>88</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 273.

undergoing the final approval and was expected eventually to be circulated across the United Nations, including United Nations country offices.

223. In ensuing discussion a representative of ICC informed the Commission about its continuing efforts, in particular through the Global Business Alliance on Post-2015 Development Agenda, to convey across the United Nations business perspectives related to rule of law and sustainable development. Issues highlighted were all relevant to the work of UNCITRAL since they dealt with barriers to private investment, entrepreneurship and trade and the sound regulatory environment for business.

224. The Commission was also informed about controversies around the concept of the rule of law that arose in the work of the Open Working Group. The Commission was therefore cautioned against embarking into areas that were considered by some States to be politicized since otherwise neutrality of UNCITRAL could be compromised and its mandate diluted. Added value in integrating UNCITRAL work in the United Nations rule of law strategies was questioned.

225. In response, it was noted that the role of UNCITRAL in promoting the rule of law in commercial relations was undisputable as evidenced by numerous General Assembly resolutions on UNCITRAL matters, including the one on the establishment of UNCITRAL, and by decisions of UNCITRAL itself. Rules regulating commercial transactions should not only be clear but also fair in order for them to be able to mitigate risks of abuses of power by commercially stronger parties and to make commercial relations economically sustainable in the long run. By reconciling in a balanced and neutral way interests of various stakeholders UNCITRAL played an important role in that regard. Integration of UNCITRAL work to broader United Nations activities was considered desirable for the benefit of end-users of UNCITRAL's standards. Concerns about compromised neutrality of UNCITRAL and dilution of its mandate as a result of closer cooperation and coordination with relevant United Nations bodies were not widely shared.

226. Concern was expressed about particular points in the draft guidance note circulated at the session, in particular references to human rights, the work of UNCITRAL in the area of commercial fraud and regulation of MSMEs. In response to the criticism that the draft did not address some important aspects, the specific scope and focus of the draft was explained by reference to the purpose of the guidance note as an advocacy tool for the promotion of the work of UNCITRAL across the United Nations, in particular in United Nations country offices.

227. The Commission reiterated its conviction that the implementation and effective use of modern private law standards in international trade are essential for advancing good governance, sustained economic development and the eradication of poverty and hunger. The promotion of the rule of law in commercial relations should therefore be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international levels. The Commission encouraged the Secretary-General to devise effective practical mechanisms to achieve such integration.

228. The Commission also emphasized the relevance of the work by UNCITRAL to post-2015 development agenda and expressed its appreciation to the chairperson at its forty-sixth session, Mr. Michael Schoell, and the secretariat, for efforts to bring the attention of relevant bodies involved in discussion of the new development agenda to issues dealt with by UNCITRAL. The Commission requested its Bureau at the current session and its secretariat to continue to take appropriate steps to ensure that the areas of work of UNCITRAL and the role of UNCITRAL in the promotion of the rule of law and in sustainable development are not overlooked in the discussion of the post-2015 development agenda and sustainable development financing, and to report to the Commission at its next session on the steps taken in that direction.

### **C. Summary of the rule of law briefing**

229. The rule of law briefing was opened by a keynote speech of the Special Representative of the Secretary-General of the United Nations on Post-2015 Development Planning,

Ms. Amina Mohammed. Ms. Mohammed referred to the envisaged place of international trade in post-2015 development agenda recognizing that trade remained one of the most productive ways of integrating into the global economy and propelling developing countries to become less aid dependent. The Commission was informed that, throughout the consultation phase of the post-2015 process, the United Nations system had clearly recognized the importance of fair, stable and predictable legal frameworks for generating inclusive, sustainable and equitable development, as well as economic growth and employment. It also acknowledged that without an enabling environment for rule-based business, investment and trade, the world would not be able to tackle development challenges, and Governments should therefore be equipped with knowledge and tools to be able to fully utilize trade as a powerful tool for sustainable development.

230. The Commission was also informed about steps expected to be taken by States and the United Nations system during the time leading to the adoption of the new development agenda in September 2015. Ms. Mohammed emphasized the need for transformative actions to promote inclusive and sustainable growth and decent employment, including through economic diversification, financial inclusion, efficient infrastructure, trade, relevant education and skills training, and the potential role of UNCITRAL in assisting States to devise and implement such transformative actions.

231. The Director of the Rule of Law Unit in the Executive Office of the Secretary-General then briefed the Commission about developments related to the United Nations rule of law agenda occurred since the 2012 rule of law briefing in UNCITRAL. Efforts being made towards effective integration of the promotion of the rule of law in commercial relations in the United Nations broader rule of law agenda were particularly highlighted. The Commission was pleased to note an increased number of references to its activities and areas relevant to its work in the Secretary-General's reports on rule of law issues. The Commission was invited to consider approaches to measuring effectiveness of its rule of law activities.

232. The General Counsel of the Global Compact Office complemented the rule of law briefing by informing the Commission about the Business Engagement Architecture, in particular its business for the rule of law segment, launched by the Secretary-General in September 2013, and work on formulating the global rule of law business principles. She also referred to the role that UNCITRAL standards, tools and expertise, in particular in the areas of public procurement and privately financed infrastructure projects, could play in the Global Compact's projects. The Commission was also informed about plans to update the United Nations publication "United Nations and Global Commerce". UNCITRAL and its secretariat were invited to cooperate in relevant projects of the Office.

233. The Commission expressed appreciation to Ms. Mohammed for her keynote speech, to the Director of the Rule of Law Unit for the briefing and to the General Counsel of the Global Compact Office for her statement and ideas about closer cooperation with UNCITRAL. The Commission encouraged closer cooperation and consultations with United Nations bodies on issues of UNCITRAL work of relevance to them.

## **D. UNCITRAL comments to the General Assembly on its role in the promotion of the rule of law through facilitating access to justice**

### **1. Summary of the panel discussion**

234. During the panel discussion, the invited speakers from Austria, Colombia, UNDP, the World Bank Group and EBRD presented surveys of States' national practices and United Nations projects in strengthening the rule of law through access to justice in the context of enforcement of contracts, insolvency proceedings, protection of security interests, legal empowerment and public procurement.

235. An advisor on global indicators of the World Bank Group presented a survey of States' practices with enforcement of contracts undertaken by the World Bank Group, in cooperation with, among others, the UNCITRAL secretariat. The survey covering 189 countries compared experiences for entrepreneurs around the world when dealing with local courts in enforcing contract and highlighted the need for reform. The main trend

identified through the survey was improvement in case management and speed of enforcement through creation of commercial courts and e-courts and appearance of mechanisms specifically designed to facilitate women's and MSME's access to justice through small claims courts. The Commission was informed about existing studies linking efficient contract enforcement with decreased informality, improved access to credit and increase in trade. It took note of upcoming research on courts touching on such issues as publication of judgements and availability of voluntary mediation.

236. The representative of Colombia presented an overview of legal reforms in the areas of secured transactions and insolvency law in Latin America and the Caribbean, focusing on issues of access to justice. She referred to the role of UNCITRAL standards and technical assistance of the UNCITRAL secretariat in those reforms. Examples of models for access to justice in the context of operation of movable property security registries and insolvency proceedings in the region were provided. The speaker also shared information about existing efforts in the region to address particular aspects of insolvency of MSMEs and their access to justice in insolvency and protection of security interests contexts.

237. The representative of UNDP shared insights into the work of the Commission on Legal Empowerment and other United Nations bodies that dealt with issues of legal empowerment and access to justice for the most marginalized segments of societies. Reports and studies by those bodies identified the extent of the relationship between informality and the perpetuation of poverty and inequality and recommended empowerment strategies particularly in relation to informality. The Commission took note of UNDP's experience with promoting low-cost justice services, community-based and informal justice systems and legal aid and legal awareness, in particular: (a) the implementation of country programming such as in Afghanistan supporting the legal empowerment of street vendors; and (b) programmes in other countries on decentralization of justice services to rural areas, mobile courts, justice centres and legal aid in civil and commercial matters. Efforts to understand the linkages between UNCITRAL work and low-cost and empowerment-based development programming of UNDP and other United Nations bodies were welcomed by the speaker.

238. Representatives of Austria and EBRD presented surveys of States' practices with facilitating access by aggrieved suppliers to justice in the context of public procurement. They identified major trends on wide range of issues related to review of procurement decisions, in particular as regards an independent administrative review, compensation mechanisms, actions that could be taken with respect to procurement contracts entered into force, groups of persons that were entitled to challenge procurement decisions, types of procurement decisions that could be challenged, deadlines for submission of complaints and taking decisions on complaints and safeguards against abuses. They concluded that there was still much room for improvement across the world to achieve impartiality and efficiency in the review of procurement decisions. The standards provided by UNCITRAL in its 2011 Model Law on Public Procurement<sup>89</sup> and accompanying guidance in the Guide to Enactment of that Model Law<sup>90</sup> were considered useful in implementing the required reforms.

239. The Commission expressed its appreciation to the panellists for their statements and noted that the surveys presented were relevant to standards being considered, administered or already prepared by UNCITRAL (in particular in the areas of settlement of commercial disputes, public procurement, contracts for the international sale of goods, e-commerce, insolvency law, security interests and an enabling legal environment for MSMEs).

## **2. Comments by the Commission on its role in promoting the rule of law by facilitating access to justice**

240. The Commission confirmed its role in strengthening the rule of law, including by facilitating access to justice. Specifically on the subtopic of the panel discussion (see paras. 234-239 above), the Commission noted that UNCITRAL work was relevant to

<sup>89</sup> Available from [www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure/2011Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html).

<sup>90</sup> Ibid.

all dimensions of access to justice (normative protection, capacity to seek remedy, and capacity to provide effective remedies):

(a) As relevant to the normative protection, UNCITRAL facilitates the law-making task of States by recognizing legitimate grievances and according to them adequate legal protection and providing appropriate range of remedies or compensation in law;

(b) As relevant to capacity to seek remedy, UNCITRAL activities are relevant in building capacity of persons to interpret, apply and implement international commercial law standards properly. Such UNCITRAL tools as the UNCITRAL website in the six languages of the United Nations, CLOUT, digests and the Transparency Registry and teaching, training and dissemination activities are all relevant for increasing legal awareness and legal empowerment. Some UNCITRAL standards directly call for publicity of legal texts applicable to commercial relations between parties (see e.g. article 5 of the UNCITRAL Model Law on Public Procurement);

(c) Capacity to seek remedy also encompasses access to formal and also informal justice mechanisms. UNCITRAL offers a sound regulatory framework for such complementary means of adjudication as arbitration and alternative dispute resolution (ADR). It assists States with strengthening the linkages between formal and those informal justice mechanisms and building interfaces between them;

(d) As relevant to capacity to provide effective remedies through effective adjudication, due process and enforcement, UNCITRAL, through its standards, promotes fair, efficient, accountable and independent justice bodies. Its standards for example address such issues as minimum requirements that administrative review bodies in the context of public procurement or arbitral tribunals should meet to be considered capable of effectively addressing various types of grievances and delivering fair outcomes through adjudication. They also touch upon issues of time and costs involved in resolving disputes, other aspects of due process, public interest litigation, public oversight and government accountability. Some of the standards and tools focus on enforcement of arbitral awards. Judicial training carried out by the UNCITRAL secretariat, CLOUT, digests and other tools and activities aimed at promoting uniform interpretation and application of international commercial law standards are also all very relevant in this context;

(e) Finally, UNCITRAL standards, in particular those in the area of e-commerce calling inter alia for legal recognition, admissibility and evidential weight of data messages and e-signatures, proved to be relevant in modernization of civil justice and administrative review procedures. UNCITRAL might be expected to contribute further in that respect, in particular as regards low-value cross-border disputes.

## **XV. Planned and possible future work**

### **A. General**

241. The Commission recalled the agreement, made at its forty-sixth session in 2013, that it should reserve time for discussion of UNCITRAL's future work as a separate topic at each Commission session.<sup>91</sup> There was general support for such a review of the Commission's overall work programme as a tool to facilitate effective planning of its activities.

242. The Commission heard a summary of the documents prepared to assist its discussions on future work at the forty-seventh session (A/CN.9/807 and A/CN.9/816). It noted that those documents addressed UNCITRAL's main activities, i.e. legislative development and activities designed to support the effective implementation, use and understanding of UNCITRAL texts (collectively referred to as "support activities").

243. It was also agreed that the resource constraints identified in those documents, and similar constraints within member States, required prioritization among UNCITRAL's

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<sup>91</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 310.

activities. The Commission recalled some general considerations in that regard that it had discussed at its forty-sixth session.<sup>92</sup>

## B. Legislative development

244. As regards the tabular presentations of legislative activity (current and possible future work), and the summaries of support activities in documents A/CN.9/807 and A/CN.9/816:

(a) A question was raised as regards the presentation of possible future work on online dispute resolution in Table 2. It was suggested that the existing mandate of Working Group III (dating from 2010) would encompass the work described in the relevant line of Table 2. The Commission recalled, with reference to the reports of its forty-fourth and forty-fifth sessions, that the original mandate could be considered to include the preparation of the guidelines for ODR providers and platforms referred to in that Table;<sup>93</sup>

(b) It was agreed that the conclusions relating to the existing mandates and future work of each of the six Working Groups reached earlier in the session (see paras. 128-130, 134, 140, 145-150, 154-158 and 162-163 above) would not be reopened. Thus, it was confirmed, the Working Groups would continue to develop legislative texts and associated guidance in the existing subject areas for the year to the forty-eighth Commission session in 2015. It was noted that the reports of four Working Groups (numbers I, II, III and VI) indicated the possible presentation of texts to the Commission for its consideration and adoption at that session.

245. A concern was raised that, as these decisions had been made earlier in the Commission's deliberations, it would be extremely difficult for the Commission while discussing future work to overturn the conclusions involved. It was proposed, therefore, that at future sessions the reports of Working Groups and planning for future work should be considered together.

246. It was emphasized that, as a consequence of these conclusions, there was no opening for additional legislative development before a Working Group in the coming year. A suggestion in paragraph 31 of document A/CN.9/807 — that a seventh Working Group could be created to allow for legislative development in other subject-areas — was not supported.

247. It was further highlighted that the forty-eighth session of the Commission might require a relatively lengthy session to accommodate the anticipated volume of texts for the Commission's consideration.

248. Additional suggestions made in paragraph 29(b) of document A/CN.9/807 so as to enhance flexibility in the legislative development process, i.e. to consider allocating more than one topic to a Working Group and to review the automatic allocation of two weeks' conference time annually to each Working Group, received some support. It was not considered necessary to implement this approach at this session, but the Commission agreed that the possibility could indeed be further discussed in the future.

249. As regards the suggestion made in paragraphs 33-35 of document A/CN.9/807 — to follow a more flexible approach to combining formal and informal working methods (terms described in para. 19 of that document) — there was support for greater flexibility on a case-by-case basis and some support for greater use of informal working methods. These expressions of support, however, were made subject to two caveats: first, that the main purpose of informal working methods was to prepare for submission of legislative proposals to a Working Group or directly to the Commission and, secondly, that their use should not compromise the resources allocated to support activities. The Commission reaffirmed its support for formal working methods as the primary method of legislative development, given the transparent, inclusive and multilingual process involved, which supported the universal applicability of UNCITRAL texts. In particular, it was emphasized that any

<sup>92</sup> Ibid., paras. 294 to 309.

<sup>93</sup> Ibid., *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 213; and *ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 73.

working method that might reduce the ability of developing countries to have a voice in legislative development should be avoided.

250. Noting the limitations on UNCITRAL's resources in general and availability of conference time in particular, a view was expressed that the primary aim of legislative development should be the production of legal texts (rather than supporting guidance, which might more appropriately be developed using informal working methods).

251. As regards a suggestion in paragraph 73(e) of document A/CN.9/816 that the Commission might set a tentative legislative development plan for 3-5 years, the prevailing view was that longer-term planning would remain an exceptional situation. The Commission recalled concerns as regards creating de facto permanent or semi-permanent Working Groups.<sup>94</sup> It was also reaffirmed that the Commission retained the authority and responsibility for setting UNCITRAL's workplan, especially as regards the mandates of Working Groups, though the role of Working Groups in identifying possible future work and the need for flexibility to allow a Working Group to decide on the type of legislative text to be produced were also recalled. Accordingly, the Commission agreed that it would not express itself at this session on future work extending beyond its forty-eighth session in 2015, but would confine itself to setting a workplan implementing the priorities noted above for the year to that session.

252. A concern was also expressed that the existing modus operandi of Working Groups tended to encourage longer mandates being suggested or developed by each Working Group for each subject area. In response, it was emphasized that the Commission would continue to review the mandates concerned on an annual basis. A proposal to set maximum time frames for legislative development in a subject area was considered to be impractical in the UNCITRAL context, and did not receive support.

253. A request was also made for information available from each Working Group on the progress and status of its work, as set out in the reports of the Working Groups, to be collated and presented to the Commission so as to allow the context of each Working Group's suggestions for future work and for prioritization among existing and new topics to be clearer.

254. It was also stated that, as existing projects came to a close, the Commission might consider at a future session reducing the number of Working Groups to five, given the resource implications of servicing six Working Groups (as noted in para. 32 of document A/CN.9/807).

255. As regards future work beyond the work of each Working Group noted above, the Commission:

(a) Reaffirmed its decision at its forty-sixth session to hold a colloquium to recognize the thirty-fifth anniversary of the United Nations Sales Convention in 2015;<sup>95</sup>

(b) Reaffirmed its decision made earlier in the session to hold a colloquium to explore possible future work in the field of electronic commerce, addressing (among other things) identity management, trust services, electronic transfers and cloud computing (see para. 150 above);

(c) Considered the proposal for possible legislative development in the field of public-private partnerships (PPPs). It was noted that no conference time was available for that topic in the coming year. Some delegations, while expressing gratitude for the efforts made to delineate the scope of possible future work, including the holding of a colloquium in March 2014,<sup>96</sup> considered that legislative development on PPPs would involve a significant and lengthy project, and for that reason did not support it. In that regard, it was noted that the colloquium report (A/CN.9/821), which was before the Commission for its consideration at the current session, identified 15 topics for consideration in developing a legislative text on PPPs, some of which appeared to be substantial.

<sup>94</sup> Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 310. See also paragraph 35 of document A/CN.9/807.

<sup>95</sup> Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 315.

<sup>96</sup> Materials of the colloquium are available from [www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2014.html](http://www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2014.html).

256. It was also stated that the existing UNCITRAL texts on privately financed infrastructure projects<sup>97</sup> could be used to harmonize and modernize laws in that field at the national level.

257. It was recalled, however, that PPPs constituted a topic of importance to all regions of the world, and that the colloquium had highlighted that importance and suggested the need for additional legislative work. The importance of PPPs to developing countries was also raised, and it was said that developing countries would encourage the Commission to take the subject up. The experience arising from consultations within one State, which had indicated support for legislative development in PPPs, was also drawn to the attention of the Commission. Accordingly, a suggestion was made that the topic of PPPs should be remitted to a working group whose existing mandate could be expected to be completed by the forty-eighth Commission session in 2015, should such a working group be identified.

258. After discussion, the Commission did not adopt that suggestion. It was noted that the Commission had not made any decision that work on PPPs should be undertaken at the working group level. The Commission reserved the possibility to consider the matter afresh if and when working group resources became available. It was also recalled that there was no certainty that any such resources would become available in 2015.

259. The question of whether the Secretariat should continue to prepare for possible legislative development in PPPs was raised. Views differed on whether a mandate to take up the subject would be given were resources available. One delegation considered that the topic was not yet amenable to harmonization.

260. Support was expressed for the Secretariat to continue to advance such preparations, internally and using informal consultations, so as to ensure that a working group could take up the subject if a mandate were given. Although some delegations considered that no such additional work would be necessary, because (as the colloquium report noted) the topic was ready for legislative development to commence, the view prevailed that very limited additional preparatory work would be appropriate provided that it did not divert UNCITRAL resources from the servicing of existing working groups and support activities. It was emphasized, however, that the work should be limited and would involve Secretariat studies of relevant issues, focussing on enabling the Secretariat being ready to assist the Commission with a further review of whether or not to take up legislative development in this subject area (an approach taken by the Secretariat for emerging issues more generally). It was agreed that the possibility of future work in PPPs would be further discussed by the Commission at its forty-eighth session in 2015.

### C. Support activities

261. The Commission expressed its appreciation for the support activities described in documents A/CN.9/807 and A/CN.9/816, as reviewed in more detail earlier in the session (see paras. 164-228 above). It acknowledged the difficulty of ensuring the availability of resources for such activities in the context of UNCITRAL's legislative work which, it was said, should take priority in UNCITRAL's activities.

262. It was recognized that seeking additional resources from the United Nations regular budget for support activities was unlikely to be successful in the current economic climate.

263. The discussions earlier in the session emphasizing the importance of support activities were recalled (see e.g. paras. 164, 169, 170, 181, 184, 187, 202, 209 and 215 above), and the need to encourage such activities at the global and regional levels through both the Secretariat and member States was highlighted.

264. In the light of the limited resources available for support activities, the Commission encouraged the Secretariat to seek partnerships and forge appropriate alliances with relevant international organizations, possibly including the Hague Conference and Unidroit, and with

<sup>97</sup> The *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects* (2000) and the *UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects* (2003), available from [www.uncitral.org/uncitral/uncitral\\_texts/procurement\\_infrastructure.html](http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html).



relevant bilateral and multilateral donors and non-governmental organizations. In addition, there was support for the suggestion in paragraph 65(b) of document A/CN.9/816 that the Secretariat should promote increased awareness of UNCITRAL's texts in these organizations and within the United Nations system. The representative of the International Insolvency Institute stated that his organization would consider supporting UNCITRAL's activities as suggested in document A/CN.9/816.

265. The suggestion in paragraph 65(c) of document A/CN.9/816 that the expertise available in the Working Groups and Commission should be used to help promote adoption and use of UNITRAL texts also received broad support. Positive experience of one delegation in encouraging the use of UNCITRAL texts in that way was raised.

266. The Commission reaffirmed the Secretariat's mandate to explore alternative sources of financing to allow for more active support activities to be undertaken. Voluntary contributions were encouraged. The Commission, however, cautioned that untied funding might be difficult to raise, and that significant contributions of this type should not be expected. In addition, it was said, there could be risks to achieving UNCITRAL's core mandate if the proportion of extrabudgetary funding was excessive as compared with UNCITRAL's regular budget resources.

## **XVI. Relevant General Assembly resolutions**

267. The Commission took note of the following four resolutions adopted by the General Assembly on 16 December 2013 regarding the work of the Commission: resolution 68/106 on the report of the United Nations Commission on International Trade Law on the work of its forty-sixth session; resolution 68/107 on revision of the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency and part four of the UNCITRAL Legislative Guide on Insolvency Law; resolution 68/108 on UNCITRAL Guide on the Implementation of a Security Rights Registry; and resolution 68/109 on UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules (as revised in 2010, with new article 1, para. 4, as adopted in 2013) (see para. 218 above for consideration by the Commission of General Assembly resolution 68/116 on the rule of law at the national and international levels, which also relate to the work of the Commission).

268. Upon considering paragraph 3 of General Assembly resolution 68/106, the Commission welcomed the recognition by the General Assembly of the Commission's opinion that the secretariat of UNCITRAL should fulfil the role of the transparency repository and the invitation to the Secretary-General to consider performing that role through the Commission's secretariat. It was recalled that at the current session the Commission had reiterated its mandate to its secretariat to establish and operate the Transparency Registry, initially as a pilot project, and to that end, to seek any necessary funding (see para. 110 above). The Commission understood paragraph 3 of General Assembly resolution 68/106 as encouraging the Secretariat to seek all possible means and resources to fulfil the functions of the transparency repository through the UNCITRAL secretariat, possibly on extrabudgetary resources in its initial stages. Acknowledging with appreciation the commitment by the European Union to provide a substantive contribution (see para. 109 above), the Commission appealed to States and interested organizations to make voluntary contributions to that end.

## **XVII. Other business**

### **A. Entitlement to summary records**

269. The Commission recalled that at its forty-fifth session, in 2012, it decided, while not relinquishing its entitlement to summary records under General Assembly resolution 49/221, to request that digital recordings continue to be provided at its forty-sixth and forty-seventh sessions, in 2013 and 2014, on a trial basis, in addition to summary records, as was done for the forty-fifth session. At that session, the Commission agreed that at its forty-seventh session, in 2014, it would assess the experience of using digital recordings and,

on the basis of that assessment, take a decision regarding the possible replacement of summary records by digital recording. The Commission requested the Secretariat to report to the Commission on a regular basis on measures taken in the United Nations system to address possible problems with the use of digital recordings. It also requested the Secretariat to assess the possibility of providing digital recordings at sessions of UNCITRAL working groups, at their request, and to report to the Commission at its forty-seventh session, in 2014.<sup>98</sup>

270. The Commission also recalled that, at its forty-sixth session, in 2013, it was informed about the experience with digital recordings in the United Nations generally, problems encountered with the use of UNCITRAL meetings digital recordings and efforts made to resolve them.<sup>99</sup> At that session, the Commission confirmed its decisions taken at the forty-fifth session as regards a trial use of digital recordings and also agreed that digital recordings at sessions of UNCITRAL working groups should be provided and made publicly available by default.<sup>100</sup> A decision on whether digital recordings of working groups should be accompanied by a script was deferred to a future session.<sup>101</sup>

271. At the current session, the Commission assessed the experience of using UNCITRAL meetings digital recordings. In that context, problems with receiving on time and in all six languages digital recordings in 2012 when the UNCITRAL session was held in New York were recalled. The Commission was also informed about delays with the release of digital recordings of the latest New York sessions of the UNCITRAL Working Groups. Another year for trial was considered necessary to allow UNCITRAL and its secretariat to ascertain whether all obstacles to the release of digital recordings in all six languages to the UNCITRAL secretariat soon after a session had been completed, regardless of where a session is held, have indeed been eliminated.

272. Reference was also made to General Assembly resolution 67/237, paragraph 26, stating that “the further expansion of [transition to digital recordings of meetings in the six official languages of the Organization as a cost-saving measure] would require consideration, including of its legal, financial and human resources implications, by the General Assembly and full compliance with the relevant resolutions of the Assembly”. It was suggested that the General Assembly should authorize in one way or another its subsidiary bodies, such as UNCITRAL, to make the transition from summary records to digital recording. Otherwise, contradictions in the Commission or the Sixth Committee with the Fifth Committee on that matter could arise if UNCITRAL were to decide to make such transition.

273. The Commission also took note of other outstanding issues to be considered in verifying that digital recordings performed at least the same functionalities as summary records. In particular, it was noted that, although the UNCITRAL summary records were not part of the Official Records of the General Assembly, they did appear as masthead documents and in the UNCITRAL Yearbook (prepared in English, French, Russian and Spanish). Mechanisms for making digital recordings part of UNCITRAL Yearbooks and costs associated with that and their allocation were not yet clear. The Yearbook was currently published only in electronic form online and on CD-ROM. The size of the audio files would currently almost certainly prevent CD-ROM publication of digital recordings.

274. In addition, summary records made available in the United Nations Official Document System (ODS) (starting with A/CN.9/SR.520 (1994)) were fully searchable (with sophisticated options) in the ODS in all United Nations six languages. All summary records reproduced in the UNCITRAL Yearbook (historically only selected records, but currently all) were also searchable on the UNCITRAL website, via a less sophisticated search engine, in English, French, Russian and Spanish (i.e. the languages in which the UNCITRAL Yearbook was being published). Currently such searching options were not available for digital recordings.

<sup>98</sup> *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 249.

<sup>99</sup> *Ibid.*, *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, paras. 334-340.

<sup>100</sup> *Ibid.*, paras. 341-342.

<sup>101</sup> *Ibid.*, para. 342.

275. The Commission recalled that at its last session an issue of transcripts that could accompany digital recordings was raised, which was considered as alleviating some of the concerns raised above. It was recalled that reference was made to the possibility of preparing transcripts only in English.<sup>102</sup>

276. On the basis of that assessment, the Commission decided to prolong the practice of providing to UNCITRAL digital recordings in parallel with summary records for at least one more year. It was noted that at its next session the Commission would again assess its experience with the use of digital recordings. It was understood that until it was ascertained that no obstacles existed to making the transition from summary records to digital recordings, summary records would have to be provided to the Commission. Confidence was expressed that with rapid technological development, satisfactory solutions across the United Nations would eventually be found. Meanwhile, the practice with the use of digital recording of UNCITRAL meetings should continue and be appropriately monitored.

## **B. Internship programme**

277. The Commission recalled the considerations taken by its secretariat in selecting candidates for internship.<sup>103</sup> The Commission was informed that, since the Secretariat's oral report to the Commission at its forty-sixth session, in July 2013, twenty-three new interns had undertaken an internship with the UNCITRAL secretariat, nine of whom in the UNCITRAL Regional Centre for Asia and the Pacific. Most interns had come from developing countries and countries in transition and were female. The Commission was informed that the procedure for selecting interns that was put in place from 1 July 2013 allowed attracting considerably more applications from all geographical regions. As a result, finding eligible and qualified candidates for internship from under-represented countries, regions and language groups has been considerably facilitated.

278. The Commission was informed about significant changes introduced on 13 January 2014 in eligibility requirements for internship with the United Nations, which were expected to produce a further positive impact on the pool of qualified applicants. Before that time, only students involved in a degree programme in a graduate school at the time of application and during the internship were eligible to apply. Since 13 January 2014, students in the final academic year of a first university degree programme and holders of a university degree who would be able to commence the internship within one year of graduation were also eligible to apply. States and observer organizations were requested to bring those important changes to the attention of interested applicants.

## **C. Evaluation of the role of the Secretariat in facilitating the work of the Commission**

279. The Commission recalled that at its fortieth session, in 2007,<sup>104</sup> it had been informed of the programme budget for the biennium 2008-2009, which listed among the expected accomplishments of the Secretariat "facilitating the work of UNCITRAL". The performance measure for that expected accomplishment was the level of satisfaction of UNCITRAL with the services provided, as evidenced by a rating on a scale ranging from 1 to 5 (5 being the highest rating).<sup>105</sup> At that session, the Commission had agreed to provide feedback to the Secretariat.

280. From the fortieth session until the forty-fifth session of the Commission, in 2012, the feedback was provided by States attending the annual sessions of UNCITRAL in response to the questionnaire circulated by the Secretariat by the end of the session. That practice had changed since the Commission's forty-fifth session, in 2012. As regards the forty-sixth session of UNCITRAL, such an evaluation questionnaire was circulated to all States by a note verbale of 27 May 2014. It covered the period from 8 July 2013 to 6 July

<sup>102</sup> Ibid., para. 335.

<sup>103</sup> Ibid., *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, paras. 328-330.

<sup>104</sup> Ibid., *Sixty-second Session, Supplement No. 17 (A/62/17)*, part one, para. 243.

<sup>105</sup> A/62/6 (Sect. 8) and Corr.1, table 8.19 (d).

2014. The deadline for submission of evaluation was 6 July 2014, the day before the opening of the current session of the Commission.

281. The Secretariat noted with regret that the 2014 questionnaire had elicited only six responses. Although the level of satisfaction with the services provided to UNCITRAL by the UNCITRAL secretariat remained high (five States respondents gave 5 out of 5 and one State respondent 4 out of 5), it was essential to receive from more States the feedback about the UNCITRAL secretariat's performance for a more objective evaluation of the role of the Secretariat. This was required for budgetary and other purposes.

282. Distribution of the questionnaire in the Commission during the session elicited eleven additional responses (ten marked 5 out of 5 and one 4 out of 5).

283. The Commission exchanged views about some aspects of work of the Secretariat. Some delegations recalled the importance of timely production of documents in all six languages of the United Nations, although it was noted that constraints were understandable and it was clear that not all production steps were within the control of the UNCITRAL secretariat. Suggestions were also made to reinforce technical assistance work, cooperation with regional organizations and academia, and to explore new means to disseminate information about UNCITRAL and its work. Most recent technical assistance efforts by the UNCITRAL secretariat, in particular in the area of dispute settlement in the Middle East, were referred to as potentially producing positive long-term impact.

284. Efforts of the Secretariat to increase the visibility of UNCITRAL within the United Nations system and find appropriate synergies with other United Nations bodies were considered an important and welcome addition to the work of the UNCITRAL secretariat. The secretariat was encouraged to continue exploring such synergies and expanding outreach to delegations of States to various United Nations bodies with the view of increasing their awareness of the work of UNCITRAL and its relevance to other areas of work of the United Nations.

285. In response to a suggestion to establish in the UNCITRAL secretariat a focal point for contacts with delegates, it was explained that the centralized mail box of UNCITRAL [uncitral@uncitral.org](mailto:uncitral@uncitral.org) was already treated as such. Delegations in the Asia and Pacific Region were also encouraged to establish closer contact with the UNCITRAL Regional Centre for Asia and the Pacific.

286. The presence of Member States at sessions of UNCITRAL was also discussed. The number of delegations present at UNCITRAL sessions was considered by some delegates as indicative of the success of the work of UNCITRAL and its secretariat. Other delegates argued that the interest of States in the work of UNCITRAL might be high but financial constraints did not allow some of them to send delegations to UNCITRAL sessions. It was recalled that the trust fund established to provide travel assistance to developing countries that were members of the Commission (see para. 168 above) and other measures as regards least developed countries envisaged in the annual resolutions of the General Assembly on the report of UNCITRAL intended to address that issue but success was limited. The suggestion was made that the Secretariat should undertake fundraising activities to raise according to any applicable rules required finance from donors and the private sector for such purpose. Costs involved were considered miniscule in comparison with benefits derived from participation of States in sessions of UNCITRAL.

287. A view was expressed that States should take more responsibility for the level and quality of participation of their delegations in the work of UNCITRAL. A visible discrepancy between information entered in the lists of participants and delegations actually present in the room was noted. It was also stated that States should also make more efforts to use the session time more efficiently.

288. After discussion, the Commission expressed general satisfaction with the work of the Secretariat and appealed to States to be more responsive to the request for evaluation of the role of the Secretariat in servicing UNCITRAL. It was noted that performance monitoring was important and was required across the United Nations. In response to proposals to make the evaluation exercise not so frequent, it was agreed that until new budget procedures were introduced, the procedure established since the Commission's forty-fifth session, in 2012,

would be followed that would require the annual evaluation by States of the role of the Secretariat in servicing UNCITRAL. Positive aspects of that procedure were highlighted, in particular since it allowed to present comprehensive evaluation of services provided to UNCITRAL and its working groups throughout the year, not only during annual sessions of UNCITRAL.

## **XVIII. Date and place of future meetings**

289. The Commission recalled that, at its thirty-sixth session, in 2003, it had agreed that: (a) its working groups should normally meet for a one-week session twice a year; (b) extra time, if required, could be allocated to a working group provided that such arrangement would not result in the increase of the total number of 12 weeks of conference services per year currently allotted to sessions of all six working groups of the Commission; and (c) if any request by a working group for extra time would result in an increase of the 12-week allotment, the request should be reviewed by the Commission, with proper justification being given by that working group regarding the reasons for which a change in the meeting pattern was needed.<sup>106</sup>

290. The Commission also recalled that, at its forty-fifth session, in 2012, it took note of paragraph 48 of General Assembly resolution 66/246 on questions relating to the proposed programme budget for the biennium 2012-2013, by which the Assembly had decided to increase non-post resources in order to provide sufficient funding for servicing the work of the Commission for 14 weeks and to retain the rotation scheme between Vienna and New York. In the light of that decision, the Commission noted at that session that the total number of 12 weeks of conference services per year could continue being allotted to six working groups of the Commission meeting twice a year for one week if annual sessions of the Commission were no longer than two weeks.<sup>107</sup> The Commission noted that otherwise adjustments would need to be made to extend the fourteen-week allotment imposed during the 2012-2013 biennium for all sessions of the Commission and its working groups.

### **A. Forty-eighth session of the Commission**

291. In the light of the considerations set out above, the Commission approved the holding of its forty-eighth session in Vienna from 29 June to 16 July 2015 (17 July being an official holiday). The Secretariat was requested to consider shortening the duration of the session by one week if the expected workload of the session would justify doing so.

### **B. Sessions of working groups**

#### **1. Sessions of working groups between the forty-seventh and the forty-eighth sessions of the Commission**

292. In the light of the considerations set out above, the Commission approved the following schedule of meetings for its working groups:

(a) Working Group I (MSMEs) would hold its twenty-third session in Vienna from 17 to 21 November 2014 and the twenty-fourth session in New York from 13 to 17 April 2015;

(b) Working Group II (Arbitration and Conciliation) would hold its sixty-first session in Vienna from 15 to 19 September 2014 and its sixty-second session in New York from 2 to 6 February 2015;

<sup>106</sup> *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/58/17)*, para. 275.

<sup>107</sup> *Ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 258.

(c) Working Group III (Online Dispute Resolution) would hold its thirtieth session in Vienna from 20 to 24 October 2014 and its thirty-first session in New York from 9 to 13 February 2015;

(d) Working Group IV (Electronic Commerce) would hold its fiftieth session in Vienna from 10 to 14 November 2014 and its fifty-first session in New York from 18 to 22 May 2015;

(e) Working Group V (Insolvency Law) would hold its forty-sixth session in Vienna from 15 to 19 December 2014 and its forty-seventh session in New York from 26 to 29 May 2015;

(f) Working Group VI (Security Interests) would hold its twenty-sixth session in Vienna from 8 to 12 December 2014 and its twenty-seventh session in New York from 20 to 24 April 2015.

293. The Commission authorized the Secretariat to adjust the schedule of working group meetings according to the needs of the working groups. The Secretariat was requested to post on the UNCITRAL website the final schedule of the working group meetings once the dates had been confirmed.

## **2. Sessions of working groups in 2015 after the forty-eighth session of the Commission**

294. The Commission noted that tentative arrangements had been made for working group meetings in 2015 after its forty-eighth session, subject to the approval by the Commission at that session:

(a) Working Group I (MSMEs) would hold its twenty-fifth session in Vienna from 12 to 16 October 2015;

(b) Working Group II (Arbitration and Conciliation) would hold its sixty-third session in Vienna from 7 to 11 September 2015;

(c) Working Group III (Online Dispute Resolution) would hold its thirty-second session in Vienna from 5 to 9 October 2015;

(d) Working Group IV (Electronic Commerce) would hold its fifty-second session in Vienna from 9 to 13 November 2015;

(e) Working Group V (Insolvency Law) would hold its forty-eighth session in Vienna from 19 to 23 October 2015;

(f) Working Group VI (Security Interests) would hold its twenty-eighth session in Vienna from 14 to 18 December 2015.

## Annex I

### **Draft convention on transparency in treaty-based investor-State arbitration**

#### *Preamble*

*The Parties to this Convention,*

*Recognizing* the value of arbitration as a method of settling disputes that may arise in the context of international relations, and the extensive and wide-ranging use of arbitration for the settlement of investor-State disputes,

*Also recognizing* the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,

*Believing* that the Rules on Transparency in Treaty-based Investor-State Arbitration adopted by the United Nations Commission on International Trade Law on 11 July 2013 (“UNCITRAL Rules on Transparency”), effective as of 1 April 2014, would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes,

*Noting* the great number of treaties providing for the protection of investments or investors already in force, and the practical importance of promoting the application of the UNCITRAL Rules on Transparency to arbitration under those already concluded investment treaties,

*Noting also* article 1(2) and (9) of the UNCITRAL Rules on Transparency,

*Have agreed as follows:*

#### *Scope of application*

##### *Article 1*

1. This Convention applies to arbitration between an investor and a State or a regional economic integration organization conducted on the basis of an investment treaty concluded before 1 April 2014 (“investor-State arbitration”).
2. The term “investment treaty” means any bilateral or multilateral treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty, which contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against contracting parties to that investment treaty.

#### *Application of the UNCITRAL Rules on Transparency*

##### *Article 2*

###### *Bilateral or multilateral application*

1. The UNCITRAL Rules on Transparency shall apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a relevant reservation under article 3(1)(a) or (b), and the claimant is of a State that is a Party that has not made a relevant reservation under article 3(1)(a).

###### *Unilateral offer of application*

2. Where the UNCITRAL Rules on Transparency do not apply pursuant to paragraph 1, the UNCITRAL Rules on Transparency shall apply to an investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a reservation relevant to that investor-State arbitration under article 3(1), and the claimant agrees to the application of the UNCITRAL Rules on Transparency.

*Applicable version of the UNCITRAL Rules on Transparency*

3. Where the UNCITRAL Rules on Transparency apply pursuant to paragraph 1 or 2, the most recent version of those Rules as to which the respondent has not made a reservation pursuant to article 3(2) shall apply.

*Article 1(7) of the UNCITRAL Rules on Transparency*

4. The final sentence of article 1(7) of the UNCITRAL Rules on Transparency shall not apply to investor-State arbitrations under paragraph 1.

*Most favoured nation provision in an investment treaty*

5. The Parties to this Convention agree that a claimant may not invoke a most favoured nation provision to seek to apply, or avoid the application of, the UNCITRAL Rules on Transparency under this Convention.

**Reservations****Article 3**

1. A Party may declare that:

(a) It shall not apply this Convention to investor-State arbitration under a specific investment treaty, identified by title and name of the contracting parties to that investment treaty;

(b) Article 2(1) and (2) shall not apply to investor-State arbitration conducted using a specific set of arbitration rules or procedures other than the UNCITRAL Arbitration Rules, and in which it is a respondent;

(c) Article 2(2) shall not apply in investor-State arbitration in which it is a respondent.

2. In the event of a revision of the UNCITRAL Rules on Transparency, a Party may, within six months of the adoption of such revision, declare that it shall not apply that revised version of the Rules.

3. Parties may make multiple reservations in a single instrument. In such an instrument, each declaration made:

(a) In respect of a specific investment treaty under paragraph (1)(a);

(b) In respect of a specific set of arbitration rules or procedures under paragraph (1)(b);

(c) Under paragraph (1)(c); or

(d) Under paragraph (2);

shall constitute a separate reservation capable of separate withdrawal under article 4(6).

4. No reservations are permitted except those expressly authorized in this article.

**Formulation of reservations****Article 4**

1. Reservations may be made by a Party at any time, save for a reservation under article 3(2).

2. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party concerned.

3. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto shall take effect simultaneously with the entry into force of this Convention in respect of the Party concerned.



4. Except for a reservation made by a Party under article 3(2), which shall take effect immediately upon deposit, a reservation deposited after the entry into force of the Convention for that Party shall take effect twelve months after the date of its deposit.
5. Reservations and their confirmations shall be deposited with the depositary.
6. Any Party that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect upon deposit.

#### *Application to investor-State arbitrations*

##### *Article 5*

This Convention and any reservation, or withdrawal of a reservation, shall apply only to investor-State arbitrations that are commenced after the date when the Convention, reservation, or withdrawal of a reservation, enters into force or takes effect in respect of each Party concerned.

#### *Depositary*

##### *Article 6*

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

#### *Signature, ratification, acceptance, approval, accession*

##### *Article 7*

1. This Convention is open for signature in Port Louis, Mauritius, on 17 March 2015, and thereafter at the United Nations Headquarters in New York by any (a) State; or (b) regional economic integration organization that is constituted by States and is a contracting party to an investment treaty.
2. This Convention is subject to ratification, acceptance or approval by the signatories to this Convention.
3. This Convention is open for accession by all States or regional economic integration organizations referred to in paragraph 1 which are not signatories as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

#### *Participation by regional economic integration organizations*

##### *Article 8*

1. When depositing an instrument of ratification, acceptance, approval or accession, a regional economic integration organization shall inform the depositary of a specific investment treaty to which it is a contracting party, identified by title and name of the contracting parties to that investment treaty.
2. When the number of Parties is relevant in this Convention, a regional economic integration organization does not count as a Party in addition to its member States which are Parties.

#### *Entry into force*

##### *Article 9*

1. This Convention shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.
2. When a State or a regional economic integration organization ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State

or regional economic integration organization six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

### *Amendment*

#### *Article 10*

1. Any Party may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to this Convention with a request that they indicate whether they favour a conference of Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.
2. The conference of Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties present and voting at the conference.
3. An adopted amendment shall be submitted by the Secretary-General of the United Nations to all the Parties for ratification, acceptance or approval.
4. An adopted amendment enters into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties which have expressed consent to be bound by it.
5. When a State or a regional economic integration organization ratifies, accepts or approves an amendment that has already entered into force, the amendment enters into force in respect of that State or that regional economic integration organization six months after the date of the deposit of its instrument of ratification, acceptance or approval.
6. Any State or regional economic integration organization which becomes a Party to the Convention after the entry into force of the amendment shall be considered as a Party to the Convention as amended.

### *Denunciation of this Convention*

#### *Article 11*

1. A Party may denounce this Convention at any time by means of a formal notification addressed to the depositary. The denunciation shall take effect twelve months after the notification is received by the depositary.
2. This Convention shall continue to apply to investor-State arbitrations commenced before the denunciation takes effect.

DONE in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed the present Convention.

## Annex II

### List of documents before the Commission at its forty-seventh session

<i>Symbol</i>	<i>Title or description</i>
A/CN.9/793	Provisional agenda, annotations thereto and scheduling of meetings of the forty-seventh session
A/CN.9/794	Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-ninth session
A/CN.9/795	Report of Working Group III (Online Dispute Resolution) on the work of its twenty-eighth session
A/CN.9/796	Report of Working Group VI (Security Interests) on the work of its twenty-fourth session
A/CN.9/797	Report of Working Group IV (Electronic Commerce) on the work of its forty-eighth session
A/CN.9/798	Report of Working Group V (Insolvency Law) on the work of its forty-fourth session
A/CN.9/799	Report of Working Group II (Arbitration and Conciliation) on the work of its sixtieth session
A/CN.9/800	Report of Working Group I (MSMEs) on the work of its twenty-second session
A/CN.9/801	Report of Working Group III (Online Dispute Resolution) on the work of its twenty-ninth session
A/CN.9/802	Report of Working Group VI (Security Interests) on the work of its twenty-fifth session
A/CN.9/803	Report of Working Group V (Insolvency Law) on the work of its forty-fifth session
A/CN.9/804	Report of Working Group IV (Electronic Commerce) on the work of its forty-ninth session
A/CN.9/805	Bibliography of recent writings related to the work of UNCITRAL
A/CN.9/806	Status of conventions and model laws
A/CN.9/807	Planned and possible future work – Part I
A/CN.9/808	Activities of the UNCITRAL Regional Centre for Asia and the Pacific
A/CN.9/809	Coordination activities
A/CN.9/810	Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts
A/CN.9/811	Draft Model Law on Secured Transactions: Security Interests in Non-Intermediated Securities
A/CN.9/812	Settlement of commercial disputes: Draft convention on transparency in treaty-based investor-State arbitration
A/CN.9/813 and Add.1	Settlement of commercial disputes: Draft convention on transparency in treaty-based investor-State arbitration, Compilation of comments
A/CN.9/814 and Add.1-5	UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
A/CN.9/815	Report of the Fourth International Insolvency Law Colloquium
A/CN.9/816	Planned and possible future work – Part II
A/CN.9/817	Online dispute resolution for cross-border electronic commerce transactions: Proposal by the Governments of Colombia, Kenya, Honduras and the United States of America
A/CN.9/818	Technical cooperation and assistance
A/CN.9/819	Possible future work in Public-Private Partnerships (PPPs) Discussion paper – Part I
A/CN.9/820	Possible future work in Public-Private Partnerships (PPPs) Discussion paper – Part II
A/CN.9/821	Possible future work in Public-Private Partnerships (PPPs) Report of the UNCITRAL colloquium on PPPs

<i>Symbol</i>	<i>Title or description</i>
A/CN.9/822	Planned and possible future work – Part III, Proposal by the Government of the United States of America: future work for Working Group II
A/CN.9/823	Planned and possible future work – Part IV, Proposal by the Government of Canada: possible future work on electronic commerce – legal issues affecting cloud computing

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**B. United Nations Conference on Trade and  
Development (UNCTAD): extract from the report of the Trade and  
Development Board on its sixty-first session**

**(TD/B/61/10)**

**Progressive development of the law of international trade: forty-seventh annual  
report of the United Nations Commission on International Trade Law**

At its 1123rd plenary meeting, the Board took note of the annual report of the United Nations Commission on International Trade Law at its forty-seventh session (A/69/17), held in New York, the United States of America, from 7 to 18 July 2014.

**C. General Assembly: Report of the Sixth Committee on the report  
of the United Nations Commission on International Trade Law on the work of its  
forty-seventh session (A/69/496)**

**[Original: English]**

*Rapporteur:* Mr. Salvatore **Zappalà** (Italy)

## **I. Introduction**

1. At its 2nd plenary meeting, on 19 September 2014, the General Assembly, on the recommendation of the General Committee, decided to include in the agenda of its sixty-ninth session the item entitled “Report of the United Nations Commission on International Trade Law on the work of its forty-seventh session” and to allocate it to the Sixth Committee.
2. The Sixth Committee considered the item at its 8th, 22nd and 24th meetings, on 13, 29 and 31 October 2014. The views of the representatives who spoke during the Committee’s consideration of the item are reflected in the relevant summary records ([A/C.6/69/SR.8](#), 22 and 24).
3. For its consideration of the item, the Committee had before it the report of the United Nations Commission on International Trade Law on the work of its forty-seventh session ([A/69/17](#)).
4. At the 8th meeting, on 13 October, the Chair of the United Nations Commission on International Trade Law at its forty-seventh session introduced the report of the Commission on the work of its forty-seventh session.

## **II. Consideration of proposals**

### **A. Draft resolution [A/C.6/69/L.5](#)**

5. At the 22nd meeting, on 29 October, the representative of Austria, on behalf of Argentina, Armenia, Australia, Austria, Belarus, Belgium, Bulgaria, Chile, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Guatemala, Hungary, India, Ireland, Israel, Italy, Japan, Liechtenstein, Lithuania, Luxembourg, the Netherlands, Nigeria, the Philippines, Portugal, the Republic of Korea, Romania, the Russian Federation, Serbia, Singapore, Slovakia, Slovenia, Spain, Switzerland, Thailand, Trinidad and Tobago, Turkey, the United Kingdom of Great Britain and Northern Ireland and the United States of America, subsequently joined by El Salvador, Jordan and New Zealand, introduced a draft resolution entitled “Report of the United Nations Commission on International Trade Law on the work of its forty-seventh session” ([A/C.6/69/L.5](#)).
6. At its 24th meeting, on 31 October, the Committee adopted draft resolution [A/C.6/69/L.5](#) without a vote (see para. 9, draft resolution I).

### **B. Draft resolution [A/C.6/69/L.6](#)**

7. At the 22nd meeting, on 29 October, the representative of Austria, on behalf of the Bureau, introduced a draft resolution entitled “United Nations Convention on Transparency in Treaty-based Investor-State Arbitration” ([A/C.6/69/L.6](#)).
8. At its 24th meeting, on 31 October, the Committee adopted draft resolution [A/C.6/69/L.6](#) without a vote (see para. 9, draft resolution II).

### III. Recommendations of the Sixth Committee

9. The Sixth Committee recommends to the General Assembly the adoption of the following draft resolutions:

#### **Draft resolution I**

#### **Report of the United Nations Commission on International Trade Law on the work of its forty-seventh session**

*The General Assembly,*

*Recalling* its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

*Reaffirming its belief* that the progressive modernization and harmonization of international trade law, in reducing or removing legal obstacles to the flow of international trade, especially those affecting developing countries, would contribute significantly to universal economic cooperation among all States on a basis of equality, equity, common interest and respect for the rule of law, to the elimination of discrimination in international trade and, thereby, to peace, stability and the well-being of all peoples,

*Having considered* the report of the Commission,<sup>1</sup>

*Reiterating its concern* that activities undertaken by other bodies in the field of international trade law without adequate coordination with the Commission might lead to undesirable duplication of efforts and would not be in keeping with the aim of promoting efficiency, consistency and coherence in the unification and harmonization of international trade law,

*Reaffirming* the mandate of the Commission, as the core legal body within the United Nations system in the field of international trade law, to coordinate legal activities in this field, in particular to avoid duplication of efforts, including among organizations formulating rules of international trade, and to promote efficiency, consistency and coherence in the modernization and harmonization of international trade law, and to continue, through its secretariat, to maintain close cooperation with other international organs and organizations, including regional organizations, active in the field of international trade law,

1. *Takes note with appreciation* of the report of the United Nations Commission on International Trade Law;<sup>1</sup>

2. *Commends* the Commission for the finalization of the draft convention on transparency in treaty-based investor-State arbitration;<sup>2</sup>

3. *Notes with appreciation* that the secretariat of the Commission has taken steps to establish and operate the repository of published information under the Rules on Transparency in Treaty-based Investor-State Arbitration (“transparency repository”), in accordance with article 8 of the Rules on Transparency, as a pilot project temporarily funded by voluntary contributions,<sup>3</sup> and in this regard requests the Secretary-General to keep the General Assembly informed of developments regarding the funding and budgetary situation of the transparency repository;

4. *Takes note with interest* of the decisions taken by the Commission as regards its future work and the progress made by the Commission in its work in the areas of arbitration and conciliation, online dispute resolution, electronic commerce, insolvency law, security interests and international trade law aimed at reducing the legal obstacles faced by micro-, small- and medium-sized enterprises throughout their life cycle, endorses the Commission’s decision to compile information on cloud computing, identity management, the use of

<sup>1</sup> *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17 (A/69/17).*

<sup>2</sup> *Ibid.*, chap. III and annex I.

<sup>3</sup> *Ibid.*, para. 109.

mobile devices in electronic commerce and single window facilities, including by organizing, co-organizing or participating in colloquiums, workshops and other meetings within available resources,<sup>4</sup> also endorses the Commission's decision to hold a colloquium and other events in 2015 to celebrate the thirty-fifth anniversary of the United Nations Convention on Contracts for the International Sale of Goods within available resources,<sup>5</sup> and commends the efforts undertaken by the Commission to improve the management of its resources while maintaining and increasing its current levels of activity, including through avoiding overlap of work and the use of informal working methods where appropriate, with due regard to the formal negotiation process;<sup>6</sup>

5. *Notes with appreciation* the projects of the Commission aimed at promoting the uniform and effective application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), done at New York on 10 June 1958,<sup>7</sup> including the preparation of a guide entitled "UNCITRAL Secretariat Guide on the New York Convention", in close cooperation with international experts;<sup>8</sup>

6. *Endorses* the efforts and initiatives of the Commission, as the core legal body within the United Nations system in the field of international trade law, aimed at increasing coordination of and cooperation on legal activities of international and regional organizations active in the field of international trade law and at promoting the rule of law at the national and international levels in this field, and in this regard appeals to relevant international and regional organizations to coordinate their legal activities with those of the Commission, to avoid duplication of efforts and to promote efficiency, consistency and coherence in the modernization and harmonization of international trade law;

7. *Reaffirms* the importance, in particular for developing countries, of the work of the Commission concerned with technical cooperation and assistance in the field of international trade law reform and development, and in this connection:

(a) Welcomes the initiatives of the Commission towards expanding, through its secretariat, its technical cooperation and assistance programme, and in that respect encourages the Secretary-General to seek partnerships with State and non-State actors to increase awareness about the work of the Commission and facilitate the effective implementation of legal standards resulting from its work;

(b) Expresses its appreciation to the Commission for carrying out technical cooperation and assistance activities and for providing assistance with legislative drafting in the field of international trade law, and draws the attention of the Secretary-General to the limited resources that are made available in this field;

(c) Expresses its appreciation to the Governments whose contributions enabled the technical cooperation and assistance activities to take place, and appeals to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the United Nations Commission on International Trade Law Trust Fund for Symposia and, where appropriate, for the financing of special projects and otherwise to assist the secretariat of the Commission in carrying out technical cooperation and assistance activities, in particular in developing countries;

(d) Reiterates its appeal to the United Nations Development Programme and other bodies responsible for development assistance, such as the World Bank and regional development banks, as well as to Governments in their bilateral aid programmes, to support the technical cooperation and assistance programme of the Commission and to cooperate with the Commission and coordinate their activities with those of the Commission in the light of the relevance and importance of the work and programmes of the Commission for the promotion of the rule of law at the national and international levels and for the implementation of the international development agenda, including the achievement of the Millennium Development Goals and the preparation of sustainable development goals;

<sup>4</sup> Ibid., para. 150.

<sup>5</sup> Ibid., para. 255.

<sup>6</sup> Ibid., chaps. III-V, VII, VIII and XV.

<sup>7</sup> United Nations, *Treaty Series*, vol. 330, No. 4739.

<sup>8</sup> See *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, chap. III, sect. E; and *ibid.*, *Sixty-ninth Session, Supplement No. 17 (A/69/17)*, para. 117.



8. *Recalls* the importance of adherence to the rules of procedure and methods of work of the Commission, including transparent and inclusive deliberations, taking into account the summary of conclusions as reproduced in annex III to the report on the work of its forty-third session,<sup>9</sup> requests the Secretariat to issue, prior to meetings of the Commission and of its working groups, a reminder of those rules of procedure and methods of work with a view to ensuring the high quality of the work of the Commission and encouraging the assessment of its instruments, and in this regard recalls its previous resolutions related to this matter;

9. *Welcomes* the activities of the United Nations Commission on International Trade Law Regional Centre for Asia and the Pacific, in the Republic of Korea, towards reaching out and providing technical assistance with international trade law reforms to developing countries in the region, notes with satisfaction expressions of interest from other States in hosting regional centres of the Commission, and requests the Secretary-General to keep the General Assembly informed of developments regarding the establishment of regional centres, in particular their funding and budgetary situation;<sup>10</sup>

10. *Appeals* to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the Trust Fund established to provide travel assistance to developing countries that are members of the Commission, at their request and in consultation with the Secretary-General, in order to enable renewal of the provision of that assistance and to increase expert representation from developing countries at sessions of the Commission and its working groups, necessary to build local expertise and capacities in those countries to put in place a regulatory and enabling environment for business, trade and investment;

11. *Decides*, in order to ensure full participation of all Member States in the sessions of the Commission and its working groups, to continue, in the competent Main Committee during the sixty-ninth session of the General Assembly, its consideration of granting travel assistance to the least developed countries that are members of the Commission, at their request and in consultation with the Secretary-General;

12. *Endorses* the conviction of the Commission that the implementation and effective use of modern private law standards in international trade are essential for advancing good governance, sustained economic development and the eradication of poverty and hunger and that the promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international levels, including through the Rule of Law Coordination and Resource Group, supported by the Rule of Law Unit in the Executive Office of the Secretary-General;

13. *Notes* the rule of law briefing and the rule of law panel discussion held at the forty-seventh session of the Commission and the comments transmitted by the Commission highlighting its role in promoting the rule of law, in particular through facilitating access to justice, pursuant to paragraph 14 of General Assembly resolution 68/116;<sup>11</sup>

14. *Notes with satisfaction* that, in paragraph 8 of the declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, adopted by consensus as resolution 67/1 of 24 September 2012, Member States recognized 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, in this regard, commended the work of the Commission in modernizing and harmonizing international trade law and that, in paragraph 7 of the declaration, Member States expressed their conviction that the rule of law and development were strongly interrelated and mutually reinforcing;

15. *Reiterates its request* to the Secretary-General, in conformity with resolutions of the General Assembly on documentation-related matters,<sup>12</sup> which, in particular, emphasize that any invitation to limit, where appropriate, the length of documents should not adversely

<sup>9</sup> Ibid., *Sixty-fifth Session, Supplement No. 17 (A/65/17)*.

<sup>10</sup> Ibid., *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, chap. XIII.

<sup>11</sup> Ibid., chap. XIV.

<sup>12</sup> Resolutions 52/214, sect. B, 57/283 B, sect. III, and 58/250, sect. III.

affect either the quality of the presentation or the substance of the documents, to bear in mind the particular characteristics of the mandate and functions of the Commission in the progressive development and codification of international trade law when implementing page limits with respect to the documentation of the Commission;<sup>13</sup>

16. *Requests* the Secretary-General to continue the publication of Commission standards and the provision of summary records of the meetings of the Commission, including committees of the whole established by the Commission for the duration of its annual session, relating to the formulation of normative texts, and takes note of the Commission's decision to continue the trial use of digital recordings, in parallel with summary records where applicable, with a view to assessing the experience of using digital recordings and, on the basis of that assessment, taking a decision at a future session regarding the possible replacement of summary records by digital recordings;<sup>14</sup>

17. *Recalls* paragraph 48 of its resolution 66/246 of 24 December 2011 regarding the rotation scheme of meetings between Vienna and New York;

18. *Notes with appreciation* the work of the Secretariat on the system for the collection and dissemination of case law on Commission texts in the six official languages of the United Nations (the CLOUT system), notes the resource-intensive nature of the system, acknowledges the need for further resources to sustain and expand it, and in this regard welcomes efforts by the Secretariat towards building partnerships with interested institutions, and appeals to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to assist the secretariat of the Commission in raising awareness as to the availability and usefulness of the CLOUT system in professional, academic and judiciary circles and in securing the funding required for the coordination and expansion of the system and the establishment, within the secretariat of the Commission, of a pillar focused on the promotion of ways and means of interpreting Commission texts in a uniform manner;

19. *Stresses* the importance of promoting the use of texts emanating from the work of the Commission for the global unification and harmonization of international trade law, and to this end urges States that have not yet done so to consider signing, ratifying or acceding to conventions, enacting model laws and encouraging the use of other relevant texts;

20. *Welcomes* the continued work of the Secretariat on digests of case law related to Commission texts, including their wide dissemination, as well as the continuing increase in the number of abstracts available through the CLOUT system, in view of the role of the digests and the CLOUT system as important tools for the promotion of the uniform interpretation of international trade law, in particular by building local capacity of judges, arbitrators and other legal practitioners to interpret those standards in the light of their international character and the need to promote uniformity in their application and the observance of good faith in international trade;

21. *Recalls* its resolutions affirming the importance of high-quality, user-friendly and cost-effective United Nations websites and the need for their multilingual development, maintenance and enrichment,<sup>15</sup> commends the fact that the website of the Commission is published in the six official languages of the United Nations, and welcomes the continuous efforts of the Commission to maintain and improve its website, including by developing new social media features, in accordance with the applicable guidelines.<sup>16</sup>

<sup>13</sup> Resolutions 59/39, para. 9, and 65/21, para. 18; see also *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17)*, paras. 124-128.

<sup>14</sup> *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17 (A/69/17)*, para. 276.

<sup>15</sup> Resolutions 52/214, sect. C, para. 3; 55/222, sect. III, para. 12; 56/64 B, sect. X; 57/130 B, sect. X; 58/101 B, sect. V, paras. 61-76; 59/126 B, sect. V, paras. 76-95; 60/109 B, sect. IV, paras. 66-80; and 61/121 B, sect. IV, paras. 65-77.

<sup>16</sup> Resolution 63/120, para. 20.

## Draft resolution II

### United Nations Convention on Transparency in Treaty-based Investor-State Arbitration

*The General Assembly,*

*Recalling* its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

*Recalling also* its resolution 68/109 of 16 December 2013, in which it recommended the use of the United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration<sup>1</sup> and Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013),<sup>2</sup>

*Recognizing* the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,

*Believing* that the Rules on Transparency contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes, increase transparency and accountability and promote good governance,

*Recalling* that, at its forty-sixth session, in 2013, the Commission recommended that the Rules on Transparency be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to investment treaties concluded before the coming into effect of the Rules on Transparency, to the extent that such application is consistent with those investment treaties, and that the Commission decided to prepare a convention that was intended to give those States that wished to make the Rules on Transparency applicable to their existing investment treaties concluded before 1 April 2014 an efficient mechanism to do so, without creating any expectation that other States would use the mechanism offered by the convention,<sup>3</sup>

*Acknowledging* that the Rules on Transparency might be made applicable to investor-State arbitration initiated pursuant to investment treaties concluded before 1 April 2014, the date of coming into effect of the Rules on Transparency, by means other than a convention,

*Recognizing* that all States and interested international organizations were invited to participate in the preparation of the draft convention either as members or as observers during the forty-seventh session of the Commission, with full opportunity to speak and make proposals,

*Noting* that the preparation of the draft convention was the subject of due deliberation in the Commission and that the draft convention benefited from consultations with Governments and interested intergovernmental and international non-governmental organizations,

*Noting with satisfaction* that the text of the draft convention was circulated for comment to all States Members of the United Nations and intergovernmental organizations invited to attend the meetings of the Commission as observers, and that the comments received were before the Commission at its forty-seventh session,<sup>4</sup>

*Taking note with satisfaction* of the decision of the Commission at its forty-seventh session to submit the draft convention to the General Assembly for its consideration,<sup>5</sup>

<sup>1</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, chap. III and annex I.

<sup>2</sup> *Ibid.*, chap. III and annex II.

<sup>3</sup> *Ibid.*, para. 127.

<sup>4</sup> See [A/CN.9/813](#) and Add.1.

<sup>5</sup> *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17 (A/69/17)*, para. 106.

*Taking note* of the draft convention approved by the Commission,<sup>6</sup>

*Expressing its appreciation* to the Government of Mauritius for its offer to host a signing ceremony for the Convention in Port Louis,

1. *Commends* the United Nations Commission on International Trade Law for preparing the draft convention on transparency in treaty-based investor-State arbitration;<sup>6</sup>
2. *Adopts* the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, contained in the annex to the present resolution;
3. *Authorizes* a ceremony for the opening for signature of the Convention to be held in Port Louis on 17 March 2015, and recommends that the Convention be known as the “Mauritius Convention on Transparency”;
4. *Calls upon* those Governments and regional economic integration organizations that wish to make the United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration<sup>1</sup> applicable to arbitrations under their existing investment treaties to consider becoming a party to the Convention.

## **Annex**

### **United Nations Convention on Transparency in Treaty-based Investor-State Arbitration**

#### **Preamble**

*The Parties to this Convention,*

*Recognizing* the value of arbitration as a method of settling disputes that may arise in the context of international relations, and the extensive and wide-ranging use of arbitration for the settlement of investor-State disputes,

*Also recognizing* the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,

*Believing* that the Rules on Transparency in Treaty-based Investor-State Arbitration adopted by the United Nations Commission on International Trade Law on 11 July 2013 (“UNCITRAL Rules on Transparency”), effective as of 1 April 2014, would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes,

*Noting* the great number of treaties providing for the protection of investments or investors already in force, and the practical importance of promoting the application of the UNCITRAL Rules on Transparency to arbitration under those already concluded investment treaties,

*Noting also* article 1(2) and (9) of the UNCITRAL Rules on Transparency,

*Have agreed* as follows:

#### **Scope of application**

##### **Article 1**

1. This Convention applies to arbitration between an investor and a State or a regional economic integration organization conducted on the basis of an investment treaty concluded before 1 April 2014 (“investor-State arbitration”).
2. The term “investment treaty” means any bilateral or multilateral treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty, which contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against contracting parties to that investment treaty.

<sup>6</sup> *Ibid.*, annex I.

## **Application of the UNCITRAL Rules on Transparency**

### **Article 2**

#### *Bilateral or multilateral application*

1. The UNCITRAL Rules on Transparency shall apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a relevant reservation under article 3(1)(a) or (b), and the claimant is of a State that is a Party that has not made a relevant reservation under article 3(1)(a).

#### *Unilateral offer of application*

2. Where the UNCITRAL Rules on Transparency do not apply pursuant to paragraph 1, the UNCITRAL Rules on Transparency shall apply to an investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a reservation relevant to that investor-State arbitration under article 3(1), and the claimant agrees to the application of the UNCITRAL Rules on Transparency.

#### *Applicable version of the UNCITRAL Rules on Transparency*

3. Where the UNCITRAL Rules on Transparency apply pursuant to paragraph 1 or 2, the most recent version of those Rules as to which the respondent has not made a reservation pursuant to article 3(2) shall apply.

#### *Article 1(7) of the UNCITRAL Rules on Transparency*

4. The final sentence of article 1(7) of the UNCITRAL Rules on Transparency shall not apply to investor-State arbitrations under paragraph 1.

#### *Most favoured nation provision in an investment treaty*

5. The Parties to this Convention agree that a claimant may not invoke a most favoured nation provision to seek to apply, or avoid the application of, the UNCITRAL Rules on Transparency under this Convention.

## **Reservations**

### **Article 3**

1. A Party may declare that:

(a) It shall not apply this Convention to investor-State arbitration under a specific investment treaty, identified by title and name of the contracting parties to that investment treaty;

(b) Article 2(1) and (2) shall not apply to investor-State arbitration conducted using a specific set of arbitration rules or procedures other than the UNCITRAL Arbitration Rules, and in which it is a respondent;

(c) Article 2(2) shall not apply in investor-State arbitration in which it is a respondent.

2. In the event of a revision of the UNCITRAL Rules on Transparency, a Party may, within six months of the adoption of such revision, declare that it shall not apply that revised version of the Rules.

3. Parties may make multiple reservations in a single instrument. In such an instrument, each declaration made:

(a) In respect of a specific investment treaty under paragraph (1)(a);

(b) In respect of a specific set of arbitration rules or procedures under paragraph (1)(b);

(c) Under paragraph (1)(c); or

(d) Under paragraph (2);

shall constitute a separate reservation capable of separate withdrawal under article 4(6).

4. No reservations are permitted except those expressly authorized in this article.

### **Formulation of reservations**

#### **Article 4**

1. Reservations may be made by a Party at any time, save for a reservation under article 3(2).
2. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party concerned.
3. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto shall take effect simultaneously with the entry into force of this Convention in respect of the Party concerned.
4. Except for a reservation made by a Party under article 3(2), which shall take effect immediately upon deposit, a reservation deposited after the entry into force of the Convention for that Party shall take effect twelve months after the date of its deposit.
5. Reservations and their confirmations shall be deposited with the depositary.
6. Any Party that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect upon deposit.

### **Application to investor-State arbitrations**

#### **Article 5**

This Convention and any reservation, or withdrawal of a reservation, shall apply only to investor-State arbitrations that are commenced after the date when the Convention, reservation, or withdrawal of a reservation, enters into force or takes effect in respect of each Party concerned.

### **Depositary**

#### **Article 6**

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

### **Signature, ratification, acceptance, approval, accession**

#### **Article 7**

1. This Convention is open for signature in Port Louis, Mauritius, on 17 March 2015, and thereafter at United Nations Headquarters in New York by any (a) State; or (b) regional economic integration organization that is constituted by States and is a contracting party to an investment treaty.
2. This Convention is subject to ratification, acceptance or approval by the signatories to this Convention.
3. This Convention is open for accession by all States or regional economic integration organizations referred to in paragraph 1 which are not signatories as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

### **Participation by regional economic integration organizations**

#### **Article 8**

1. When depositing an instrument of ratification, acceptance, approval or accession, a regional economic integration organization shall inform the depositary of a specific investment treaty to which it is a contracting party, identified by title and name of the contracting parties to that investment treaty.

2. When the number of Parties is relevant in this Convention, a regional economic integration organization does not count as a Party in addition to its member States which are Parties.

### **Entry into force**

#### **Article 9**

1. This Convention shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.
2. When a State or a regional economic integration organization ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State or regional economic integration organization six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

### **Amendment**

#### **Article 10**

1. Any Party may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to this Convention with a request that they indicate whether they favour a conference of Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.
2. The conference of Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties present and voting at the conference.
3. An adopted amendment shall be submitted by the Secretary-General of the United Nations to all the Parties for ratification, acceptance or approval.
4. An adopted amendment enters into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties which have expressed consent to be bound by it.
5. When a State or a regional economic integration organization ratifies, accepts or approves an amendment that has already entered into force, the amendment enters into force in respect of that State or that regional economic integration organization six months after the date of the deposit of its instrument of ratification, acceptance or approval.
6. Any State or regional economic integration organization which becomes a Party to the Convention after the entry into force of the amendment shall be considered as a Party to the Convention as amended.

### **Denunciation of this Convention**

#### **Article 11**

1. A Party may denounce this Convention at any time by means of a formal notification addressed to the depositary. The denunciation shall take effect twelve months after the notification is received by the depositary.
2. This Convention shall continue to apply to investor-State arbitrations commenced before the denunciation takes effect.

DONE in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed the present Convention.

## D. General Assembly resolutions 69/115, 69/116, 69/123 and 69/313

### 69/115. Report of the United Nations Commission on International Trade Law on the work of its forty-seventh session

*The General Assembly,*

*Recalling* its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

*Reaffirming its belief* that the progressive modernization and harmonization of international trade law, in reducing or removing legal obstacles to the flow of international trade, especially those affecting developing countries, would contribute significantly to universal economic cooperation among all States on a basis of equality, equity, common interest and respect for the rule of law, to the elimination of discrimination in international trade and, thereby, to peace, stability and the well-being of all peoples,

*Having considered* the report of the Commission,<sup>1</sup>

*Reiterating its concern* that activities undertaken by other bodies in the field of international trade law without adequate coordination with the Commission might lead to undesirable duplication of efforts and would not be in keeping with the aim of promoting efficiency, consistency and coherence in the unification and harmonization of international trade law,

*Reaffirming* the mandate of the Commission, as the core legal body within the United Nations system in the field of international trade law, to coordinate legal activities in this field, in particular to avoid duplication of efforts, including among organizations formulating rules of international trade, and to promote efficiency, consistency and coherence in the modernization and harmonization of international trade law, and to continue, through its secretariat, to maintain close cooperation with other international organs and organizations, including regional organizations, active in the field of international trade law,

1. *Takes note with appreciation* of the report of the United Nations Commission on International Trade Law;<sup>1</sup>

2. *Commends* the Commission for the finalization of the draft convention on transparency in treaty-based investor-State arbitration;<sup>2</sup>

3. *Notes with appreciation* that the secretariat of the Commission has taken steps to establish and operate the repository of published information under the Rules on Transparency in Treaty-based Investor-State Arbitration (“transparency repository”), in accordance with article 8 of the Rules on Transparency, as a pilot project temporarily funded by voluntary contributions,<sup>3</sup> and in this regard requests the Secretary-General to keep the General Assembly informed of developments regarding the funding and budgetary situation of the transparency repository;

4. *Takes note with interest* of the decisions taken by the Commission as regards its future work and the progress made by the Commission in its work in the areas of arbitration and conciliation, online dispute resolution, electronic commerce, insolvency law, security interests and international trade law aimed at reducing the legal obstacles faced by micro-, small- and medium-sized enterprises throughout their life cycle, endorses the Commission’s decision to compile information on cloud computing, identity management, the use of mobile devices in electronic commerce and single window facilities, including by organizing, co-organizing or participating in colloquiums, workshops and other meetings within available resources,<sup>4</sup> also endorses the Commission’s decision to hold a colloquium and other events in 2015 to celebrate the thirty-fifth anniversary of the United Nations

<sup>1</sup> *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17 (A/69/17).*

<sup>2</sup> *Ibid.*, chap. III and annex I.

<sup>3</sup> *Ibid.*, para. 109.

<sup>4</sup> *Ibid.*, para. 150.



Convention on Contracts for the International Sale of Goods within available resources,<sup>5</sup> and commends the efforts undertaken by the Commission to improve the management of its resources while maintaining and increasing its current levels of activity, including through avoiding overlap of work and the use of informal working methods where appropriate, with due regard to the formal negotiation process;<sup>6</sup>

5. *Notes with appreciation* the projects of the Commission aimed at promoting the uniform and effective application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), done at New York on 10 June 1958,<sup>7</sup> including the preparation of a guide entitled “UNCITRAL Secretariat Guide on the New York Convention”, in close cooperation with international experts;<sup>8</sup>

6. *Endorses* the efforts and initiatives of the Commission, as the core legal body within the United Nations system in the field of international trade law, aimed at increasing coordination of and cooperation on legal activities of international and regional organizations active in the field of international trade law and at promoting the rule of law at the national and international levels in this field, and in this regard appeals to relevant international and regional organizations to coordinate their legal activities with those of the Commission, to avoid duplication of efforts and to promote efficiency, consistency and coherence in the modernization and harmonization of international trade law;

7. *Reaffirms* the importance, in particular for developing countries, of the work of the Commission concerned with technical cooperation and assistance in the field of international trade law reform and development, and in this connection:

(a) Welcomes the initiatives of the Commission towards expanding, through its secretariat, its technical cooperation and assistance programme, and in that respect encourages the Secretary-General to seek partnerships with State and non-State actors to increase awareness about the work of the Commission and facilitate the effective implementation of legal standards resulting from its work;

(b) Expresses its appreciation to the Commission for carrying out technical cooperation and assistance activities and for providing assistance with legislative drafting in the field of international trade law, and draws the attention of the Secretary-General to the limited resources that are made available in this field;

(c) Expresses its appreciation to the Governments whose contributions enabled the technical cooperation and assistance activities to take place, and appeals to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the United Nations Commission on International Trade Law Trust Fund for Symposia and, where appropriate, for the financing of special projects and otherwise to assist the secretariat of the Commission in carrying out technical cooperation and assistance activities, in particular in developing countries;

(d) Reiterates its appeal to the United Nations Development Programme and other bodies responsible for development assistance, such as the World Bank and regional development banks, as well as to Governments in their bilateral aid programmes, to support the technical cooperation and assistance programme of the Commission and to cooperate with the Commission and coordinate their activities with those of the Commission in the light of the relevance and importance of the work and programmes of the Commission for the promotion of the rule of law at the national and international levels and for the implementation of the international development agenda, including the achievement of the Millennium Development Goals and the preparation of sustainable development goals;

8. *Recalls* the importance of adherence to the rules of procedure and methods of work of the Commission, including transparent and inclusive deliberations, taking into account the summary of conclusions as reproduced in annex III to the report on the work of

<sup>5</sup> Ibid., para. 255.

<sup>6</sup> Ibid., chaps. III–V, VII, VIII and XV.

<sup>7</sup> United Nations, *Treaty Series*, vol. 330, No. 4739.

<sup>8</sup> See *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, chap. III, sect. E; and *ibid.*, *Sixty-ninth Session, Supplement No. 17 (A/69/17)*, para. 117.

its forty-third session,<sup>9</sup> requests the Secretariat to issue, prior to meetings of the Commission and of its working groups, a reminder of those rules of procedure and methods of work with a view to ensuring the high quality of the work of the Commission and encouraging the assessment of its instruments, and in this regard recalls its previous resolutions related to this matter;

9. *Welcomes* the activities of the United Nations Commission on International Trade Law Regional Centre for Asia and the Pacific, in the Republic of Korea, towards reaching out and providing technical assistance with international trade law reforms to developing countries in the region, notes with satisfaction expressions of interest from other States in hosting regional centres of the Commission, and requests the Secretary-General to keep the General Assembly informed of developments regarding the establishment of regional centres, in particular their funding and budgetary situation;<sup>10</sup>

10. *Appeals* to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the Trust Fund established to provide travel assistance to developing countries that are members of the Commission, at their request and in consultation with the Secretary-General, in order to enable renewal of the provision of that assistance and to increase expert representation from developing countries at sessions of the Commission and its working groups, necessary to build local expertise and capacities in those countries to put in place a regulatory and enabling environment for business, trade and investment;

11. *Decides*, in order to ensure full participation of all Member States in the sessions of the Commission and its working groups, to continue, in the competent Main Committee during the sixty-ninth session of the General Assembly, its consideration of granting travel assistance to the least developed countries that are members of the Commission, at their request and in consultation with the Secretary-General;

12. *Endorses* the conviction of the Commission that the implementation and effective use of modern private law standards in international trade are essential for advancing good governance, sustained economic development and the eradication of poverty and hunger and that the promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international levels, including through the Rule of Law Coordination and Resource Group, supported by the Rule of Law Unit in the Executive Office of the Secretary-General;

13. *Notes* the rule of law briefing and the rule of law panel discussion held at the forty-seventh session of the Commission and the comments transmitted by the Commission highlighting its role in promoting the rule of law, in particular through facilitating access to justice, pursuant to paragraph 14 of General Assembly resolution 68/116;<sup>11</sup>

14. *Notes with satisfaction* that, in paragraph 8 of the declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, adopted by consensus as resolution 67/1 of 24 September 2012, Member States recognized 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, in this regard, commended the work of the Commission in modernizing and harmonizing international trade law and that, in paragraph 7 of the declaration, Member States expressed their conviction that the rule of law and development were strongly interrelated and mutually reinforcing;

15. *Reiterates its request* to the Secretary-General, in conformity with resolutions of the General Assembly on documentation-related matters,<sup>12</sup> which, in particular, emphasize that any invitation to limit, where appropriate, the length of documents should not adversely affect either the quality of the presentation or the substance of the documents, to bear in mind the particular characteristics of the mandate and functions of the Commission in the

<sup>9</sup> *Ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*.

<sup>10</sup> *Ibid.*, *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, chap. XIII.

<sup>11</sup> *Ibid.*, chap. XIV.

<sup>12</sup> Resolutions 52/214, sect. B, 57/283 B, sect. III, and 58/250, sect. III.

progressive development and codification of international trade law when implementing page limits with respect to the documentation of the Commission;<sup>13</sup>

16. *Requests* the Secretary-General to continue the publication of Commission standards and the provision of summary records of the meetings of the Commission, including committees of the whole established by the Commission for the duration of its annual session, relating to the formulation of normative texts, and takes note of the Commission's decision to continue the trial use of digital recordings, in parallel with summary records where applicable, with a view to assessing the experience of using digital recordings and, on the basis of that assessment, taking a decision at a future session regarding the possible replacement of summary records by digital recordings;<sup>14</sup>

17. *Recalls* paragraph 48 of its resolution 66/246 of 24 December 2011 regarding the rotation scheme of meetings between Vienna and New York;

18. *Notes with appreciation* the work of the Secretariat on the system for the collection and dissemination of case law on Commission texts in the six official languages of the United Nations (the CLOUT system), notes the resource-intensive nature of the system, acknowledges the need for further resources to sustain and expand it, and in this regard welcomes efforts by the Secretariat towards building partnerships with interested institutions, and appeals to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to assist the secretariat of the Commission in raising awareness as to the availability and usefulness of the CLOUT system in professional, academic and judiciary circles and in securing the funding required for the coordination and expansion of the system and the establishment, within the secretariat of the Commission, of a pillar focused on the promotion of ways and means of interpreting Commission texts in a uniform manner;

19. *Stresses* the importance of promoting the use of texts emanating from the work of the Commission for the global unification and harmonization of international trade law, and to this end urges States that have not yet done so to consider signing, ratifying or acceding to conventions, enacting model laws and encouraging the use of other relevant texts;

20. *Welcomes* the continued work of the Secretariat on digests of case law related to Commission texts, including their wide dissemination, as well as the continuing increase in the number of abstracts available through the CLOUT system, in view of the role of the digests and the CLOUT system as important tools for the promotion of the uniform interpretation of international trade law, in particular by building local capacity of judges, arbitrators and other legal practitioners to interpret those standards in the light of their international character and the need to promote uniformity in their application and the observance of good faith in international trade;

21. *Recalls* its resolutions affirming the importance of high-quality, user-friendly and cost-effective United Nations websites and the need for their multilingual development, maintenance and enrichment,<sup>15</sup> commends the fact that the website of the Commission is published in the six official languages of the United Nations, and welcomes the continuous efforts of the Commission to maintain and improve its website, including by developing new social media features, in accordance with the applicable guidelines.<sup>16</sup>

*68th plenary meeting  
10 December 2014*

<sup>13</sup> Resolutions 59/39, para. 9, and 65/21, para. 18; see also *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17)*, paras. 124–128.

<sup>14</sup> *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17 (A/69/17)*, para. 276.

<sup>15</sup> Resolutions 52/214, sect. C, para. 3; 55/222, sect. III, para. 12; 56/64 B, sect. X; 57/130 B, sect. X; 58/101 B, sect. V, paras. 61–76; 59/126 B, sect. V, paras. 76–95; 60/109 B, sect. IV, paras. 66–80; and 61/121 B, sect. IV, paras. 65–77.

<sup>16</sup> Resolution 63/120, para. 20.

## 69/116 United Nations Convention on Transparency in Treaty based Investor-State Arbitration

*The General Assembly,*

*Recalling* its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

*Recalling also* its resolution 68/109 of 16 December 2013, in which it recommended the use of the United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration<sup>1</sup> and Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013),<sup>2</sup>

*Recognizing* the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,

*Believing* that the Rules on Transparency contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes, increase transparency and accountability and promote good governance,

*Recalling* that, at its forty-sixth session, in 2013, the Commission recommended that the Rules on Transparency be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to investment treaties concluded before the coming into effect of the Rules on Transparency, to the extent that such application is consistent with those investment treaties, and that the Commission decided to prepare a convention that was intended to give those States that wished to make the Rules on Transparency applicable to their existing investment treaties concluded before 1 April 2014 an efficient mechanism to do so, without creating any expectation that other States would use the mechanism offered by the convention,<sup>3</sup>

*Acknowledging* that the Rules on Transparency might be made applicable to investor-State arbitration initiated pursuant to investment treaties concluded before 1 April 2014, the date of coming into effect of the Rules on Transparency, by means other than a convention,

*Recognizing* that all States and interested international organizations were invited to participate in the preparation of the draft convention either as members or as observers during the forty-seventh session of the Commission, with full opportunity to speak and make proposals,

*Noting* that the preparation of the draft convention was the subject of due deliberation in the Commission and that the draft convention benefited from consultations with Governments and interested intergovernmental and international non-governmental organizations,

*Noting with satisfaction* that the text of the draft convention was circulated for comment to all States Members of the United Nations and intergovernmental organizations invited to attend the meetings of the Commission as observers, and that the comments received were before the Commission at its forty-seventh session,<sup>4</sup>

*Taking note with satisfaction* of the decision of the Commission at its forty-seventh session to submit the draft convention to the General Assembly for its consideration,<sup>5</sup>

*Taking note* of the draft convention approved by the Commission,<sup>6</sup>

<sup>1</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, chap. III and annex I.

<sup>2</sup> *Ibid.*, chap. III and annex II.

<sup>3</sup> *Ibid.*, para. 127.

<sup>4</sup> See *A/CN.9/813* and Add.1.

<sup>5</sup> *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17 (A/69/17)*, para. 106.

<sup>6</sup> *Ibid.*, annex I.

*Expressing its appreciation* to the Government of Mauritius for its offer to host a signing ceremony for the Convention in Port Louis,

1. *Commends* the United Nations Commission on International Trade Law for preparing the draft convention on transparency in treaty-based investor-State arbitration;<sup>6</sup>
2. *Adopts* the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, contained in the annex to the present resolution;
3. *Authorizes* a ceremony for the opening for signature of the Convention to be held in Port Louis on 17 March 2015, and recommends that the Convention be known as the “Mauritius Convention on Transparency”;
4. *Calls upon* those Governments and regional economic integration organizations that wish to make the United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration<sup>1</sup> applicable to arbitrations under their existing investment treaties to consider becoming a party to the Convention.

*68th plenary meeting  
10 December 2014*

## **Annex**

### **United Nations Convention on Transparency in Treaty-based Investor-State Arbitration**

#### **Preamble**

*The Parties to this Convention,*

*Recognizing* the value of arbitration as a method of settling disputes that may arise in the context of international relations, and the extensive and wide-ranging use of arbitration for the settlement of investor-State disputes,

*Also recognizing* the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,

*Believing* that the Rules on Transparency in Treaty-based Investor-State Arbitration adopted by the United Nations Commission on International Trade Law on 11 July 2013 (“UNCITRAL Rules on Transparency”), effective as of 1 April 2014, would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes,

*Noting* the great number of treaties providing for the protection of investments or investors already in force, and the practical importance of promoting the application of the UNCITRAL Rules on Transparency to arbitration under those already concluded investment treaties,

*Noting also* article 1(2) and (9) of the UNCITRAL Rules on Transparency,

*Have agreed* as follows:

#### **Scope of application**

##### **Article 1**

1. This Convention applies to arbitration between an investor and a State or a regional economic integration organization conducted on the basis of an investment treaty concluded before 1 April 2014 (“investor-State arbitration”).
2. The term “investment treaty” means any bilateral or multilateral treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty, which contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against contracting parties to that investment treaty.

## **Application of the UNCITRAL Rules on Transparency**

### **Article 2**

#### *Bilateral or multilateral application*

1. The UNCITRAL Rules on Transparency shall apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a relevant reservation under article 3(1)(a) or (b), and the claimant is of a State that is a Party that has not made a relevant reservation under article 3(1)(a).

#### *Unilateral offer of application*

2. Where the UNCITRAL Rules on Transparency do not apply pursuant to paragraph 1, the UNCITRAL Rules on Transparency shall apply to an investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a reservation relevant to that investor-State arbitration under article 3(1), and the claimant agrees to the application of the UNCITRAL Rules on Transparency.

#### *Applicable version of the UNCITRAL Rules on Transparency*

3. Where the UNCITRAL Rules on Transparency apply pursuant to paragraph 1 or 2, the most recent version of those Rules as to which the respondent has not made a reservation pursuant to article 3(2) shall apply.

#### *Article 1(7) of the UNCITRAL Rules on Transparency*

4. The final sentence of article 1(7) of the UNCITRAL Rules on Transparency shall not apply to investor-State arbitrations under paragraph 1.

#### *Most favoured nation provision in an investment treaty*

5. The Parties to this Convention agree that a claimant may not invoke a most favoured nation provision to seek to apply, or avoid the application of, the UNCITRAL Rules on Transparency under this Convention.

## **Reservations**

### **Article 3**

1. A Party may declare that:

(a) It shall not apply this Convention to investor-State arbitration under a specific investment treaty, identified by title and name of the contracting parties to that investment treaty;

(b) Article 2(1) and (2) shall not apply to investor-State arbitration conducted using a specific set of arbitration rules or procedures other than the UNCITRAL Arbitration Rules, and in which it is a respondent;

(c) Article 2(2) shall not apply in investor-State arbitration in which it is a respondent.

2. In the event of a revision of the UNCITRAL Rules on Transparency, a Party may, within six months of the adoption of such revision, declare that it shall not apply that revised version of the Rules.

3. Parties may make multiple reservations in a single instrument. In such an instrument, each declaration made:

(a) In respect of a specific investment treaty under paragraph (1)(a);

(b) In respect of a specific set of arbitration rules or procedures under paragraph (1)(b);

(c) Under paragraph (1)(c); or

(d) Under paragraph (2);

shall constitute a separate reservation capable of separate withdrawal under article 4(6).

4. No reservations are permitted except those expressly authorized in this article.

**Formulation of reservations****Article 4**

1. Reservations may be made by a Party at any time, save for a reservation under article 3(2).
2. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party concerned.
3. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto shall take effect simultaneously with the entry into force of this Convention in respect of the Party concerned.
4. Except for a reservation made by a Party under article 3(2), which shall take effect immediately upon deposit, a reservation deposited after the entry into force of the Convention for that Party shall take effect twelve months after the date of its deposit.
5. Reservations and their confirmations shall be deposited with the depositary.
6. Any Party that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect upon deposit.

**Application to investor-State arbitrations****Article 5**

This Convention and any reservation, or withdrawal of a reservation, shall apply only to investor-State arbitrations that are commenced after the date when the Convention, reservation, or withdrawal of a reservation, enters into force or takes effect in respect of each Party concerned.

**Depositary****Article 6**

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

**Signature, ratification, acceptance, approval, accession****Article 7**

1. This Convention is open for signature in Port Louis, Mauritius, on 17 March 2015, and thereafter at United Nations Headquarters in New York by any (a) State; or (b) regional economic integration organization that is constituted by States and is a contracting party to an investment treaty.
2. This Convention is subject to ratification, acceptance or approval by the signatories to this Convention.
3. This Convention is open for accession by all States or regional economic integration organizations referred to in paragraph 1 which are not signatories as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

**Participation by regional economic integration organizations****Article 8**

1. When depositing an instrument of ratification, acceptance, approval or accession, a regional economic integration organization shall inform the depositary of a specific investment treaty to which it is a contracting party, identified by title and name of the contracting parties to that investment treaty.
2. When the number of Parties is relevant in this Convention, a regional economic integration organization does not count as a Party in addition to its member States which are Parties.

**Entry into force****Article 9**

1. This Convention shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.
2. When a State or a regional economic integration organization ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State or regional economic integration organization six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

**Amendment****Article 10**

1. Any Party may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to this Convention with a request that they indicate whether they favour a conference of Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.
2. The conference of Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties present and voting at the conference.
3. An adopted amendment shall be submitted by the Secretary-General of the United Nations to all the Parties for ratification, acceptance or approval.
4. An adopted amendment enters into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties which have expressed consent to be bound by it.
5. When a State or a regional economic integration organization ratifies, accepts or approves an amendment that has already entered into force, the amendment enters into force in respect of that State or that regional economic integration organization six months after the date of the deposit of its instrument of ratification, acceptance or approval.
6. Any State or regional economic integration organization which becomes a Party to the Convention after the entry into force of the amendment shall be considered as a Party to the Convention as amended.

**Denunciation of this Convention****Article 11**

1. A Party may denounce this Convention at any time by means of a formal notification addressed to the depositary. The denunciation shall take effect twelve months after the notification is received by the depositary.
2. This Convention shall continue to apply to investor-State arbitrations commenced before the denunciation takes effect.

DONE in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed the present Convention.



**69/123 The rule of law at the national and international levels**

*The General Assembly,*

*Recalling* its resolution 68/116 of 16 December 2013,

*Reaffirming its commitment* to the purposes and principles of the Charter of the United Nations and international law, which are indispensable foundations of a more peaceful, prosperous and just world, and reiterating its determination to foster strict respect for them and to establish a just and lasting peace all over the world,

*Reaffirming* that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations,

*Reaffirming also* the need for universal adherence to and implementation of the rule of law at both the national and international levels and its solemn commitment to an international order based on the rule of law and international law, which, together with the principles of justice, is essential for peaceful coexistence and cooperation among States,

*Bearing in mind* that the activities of the United Nations carried out in support of efforts of Governments to promote and consolidate the rule of law are undertaken in accordance with the Charter, and stressing the need to strengthen support to Member States, upon their request, in the domestic implementation of their respective international obligations through enhanced technical assistance and capacity-building,

*Convinced* that the advancement of the rule of law at the national and international levels is essential for the realization of sustained economic growth, sustainable development, the eradication of poverty and hunger and the protection of all human rights and fundamental freedoms, and acknowledging that collective security depends on effective cooperation, in accordance with the Charter and international law, against transnational threats,

*Reaffirming* the duty of all States to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations and to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered, in accordance with Chapter VI of the Charter, and calling upon States that have not yet done so to consider accepting the jurisdiction of the International Court of Justice in accordance with its Statute,

*Convinced* that the promotion of and respect for the rule of law at the national and international levels, as well as justice and good governance, should guide the activities of the United Nations and its Member States,

*Recalling* paragraph 134 (e) of the 2005 World Summit Outcome,<sup>1</sup>

1. *Recalls* the high-level meeting of the General Assembly on the rule of law at the national and international levels, held during the high-level segment of its sixty-seventh session, and the declaration adopted at that meeting,<sup>2</sup> takes note of the report of the Secretary-General submitted pursuant to paragraph 41 of the declaration,<sup>3</sup> and requests the Sixth Committee to continue its consideration of ways and means of further developing the linkages of the rule of law and the three pillars of the United Nations;

2. *Acknowledges* the efforts to strengthen the rule of law through voluntary pledges, encourages States that have not done so to consider making pledges, individually or jointly, based on their national priorities, and also encourages those States that have made pledges to exchange information, knowledge and best practices in this regard;

3. *Takes note* of the annual report of the Secretary-General on strengthening and coordinating United Nations rule of law activities;<sup>4</sup>

<sup>1</sup> Resolution 60/1.

<sup>2</sup> Resolution 67/1.

<sup>3</sup> A/68/213/Add.1.

<sup>4</sup> A/69/181.

4. *Reaffirms* the role of the General Assembly in encouraging the progressive development of international law and its codification, and reaffirms further that States shall abide by all their obligations under international law;
5. *Also reaffirms* the imperative of upholding and promoting the rule of law at the international level in accordance with the principles of the Charter of the United Nations;
6. *Welcomes* the dialogue initiated by the Rule of Law Coordination and Resource Group and the Rule of Law Unit in the Executive Office of the Secretary-General with Member States on the topic “Promoting the rule of law at the international level”, and calls for the continuation of this dialogue with a view to fostering the rule of law at the international level;
7. *Stresses* the importance of adherence to the rule of law at the national level and the need to strengthen support to Member States, upon their request, in the domestic implementation of their respective international obligations through enhanced technical assistance and capacity-building;
8. *Reiterates its request* to the Secretary-General to ensure greater coordination and coherence among the United Nations entities and with donors and recipients, and reiterates its call for greater evaluation of the effectiveness of such activities, including possible measures to improve the effectiveness of those capacity-building activities;
9. *Calls*, in this context, for dialogue to be enhanced among all stakeholders with a view to placing national perspectives at the centre of rule of law assistance in order to strengthen national ownership, while recognizing that rule of law activities must be anchored in a national context and that States have different national experiences in the development of their systems of the rule of law, taking into account their legal, political, socioeconomic, cultural, religious and other local specificities, while also recognizing that there are common features founded on international norms and standards;
10. *Calls upon* the Secretary-General and the United Nations system to systematically address, as appropriate, aspects of the rule of law in relevant activities, including the participation of women in rule of law-related activities, recognizing the importance of the rule of law to virtually all areas of United Nations engagement;
11. *Expresses full support* for the overall coordination and coherence role of the Rule of Law Coordination and Resource Group within the United Nations system within existing mandates, supported by the Rule of Law Unit, under the leadership of the Deputy Secretary-General;
12. *Requests* the Secretary-General to submit, in a timely manner, his next annual report on United Nations rule of law activities, in accordance with paragraph 5 of its resolution 63/128 of 11 December 2008;
13. *Recognizes* the importance of restoring confidence in the rule of law as a key element of transitional justice;
14. *Recalls* the commitment of the Member States to take all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid, encourages further dialogue and the sharing of national practices in strengthening the rule of law through access to justice, including with regard to legal aid, where appropriate, in both criminal and civil proceedings, and in this regard stresses the need to intensify the assistance extended to Governments upon their request;
15. *Stresses* the importance of promoting the sharing of national practices and of inclusive dialogue, and invites the Secretary-General to propose ways for Member States to voluntarily exchange best national practices on the rule of law and to include, in his annual report to the General Assembly at its seventieth session, an analytical summary of the thematic debates held pursuant to resolutions 61/39 of 4 December 2006, 62/70 of 6 December 2007, 63/128 of 11 December 2008, 64/116 of 16 December 2009, 65/32 of 6 December 2010, 66/102 of 9 December 2011 and 67/97 of 14 December 2012;
16. *Encourages* the Secretary-General and the United Nations system to accord high priority to rule of law activities;

17. *Invites* the International Court of Justice, the United Nations Commission on International Trade Law and the International Law Commission to continue to comment, in their respective reports to the General Assembly, on their current roles in promoting the rule of law;

18. *Invites* the Rule of Law Coordination and Resource Group and the Rule of Law Unit to continue to interact with Member States in a regular, transparent and inclusive manner, in particular in informal briefings;

19. *Stresses* the need for the Rule of Law Unit to carry out its tasks in an effective and sustainable manner and the need to provide it with reasonable means required to that effect;

20. *Decides* to include in the provisional agenda of its seventieth session the item entitled “The rule of law at the national and international levels”, and invites Member States to focus their comments in the upcoming Sixth Committee debate on the subtopic “The role of multilateral treaty processes in promoting and advancing the rule of law”.

*68th plenary meeting  
10 December 2014*

**69/313 Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)**

*The General Assembly,*

Recalling its resolution 68/204 of 20 December 2013, in which it decided to convene a third international conference on financing for development, as well as its resolutions 68/279 of 30 June 2014 and 69/278 of 8 May 2015,

1. *Endorses* the Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda) adopted by the Conference, which is contained in the annex to the present resolution;

2. *Expresses its profound gratitude* to the Government and the people of Ethiopia for hosting the third International Conference on Financing for Development, from 13 to 16 July 2015, and for providing all the necessary support.

*99th plenary meeting  
27 July 2015*

**Annex**

**Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)**

**I. A global framework for financing development post-2015**

1. We, the Heads of State and Government and High Representatives, gathered in Addis Ababa from 13 to 16 July 2015, affirm our strong political commitment to address the challenge of financing and creating an enabling environment at all levels for sustainable development in the spirit of global partnership and solidarity. We reaffirm and build on the 2002 Monterrey Consensus<sup>1</sup> and the 2008 Doha Declaration.<sup>2</sup> Our goal is to end poverty and hunger and to achieve sustainable development in its three dimensions through promoting inclusive economic growth, protecting the environment and promoting social inclusion. We commit to respecting all human rights, including the right to development. We will ensure gender equality and women's and girls' empowerment. We will promote peaceful and inclusive societies and advance fully towards an equitable global economic system in which no country or person is left behind, enabling decent work and productive livelihoods for all, while preserving the planet for our children and future generations.

2. In September 2015, the United Nations will host a summit to adopt an ambitious and transformative post-2015 development agenda, including sustainable development goals. This agenda must be underpinned by equally ambitious and credible means of implementation. We have come together to establish a holistic and forward-looking framework and to commit to concrete actions to deliver on the promise of that agenda. Our task is threefold: to follow-up on commitments and assess the progress made in the implementation of the Monterrey Consensus and the Doha Declaration; to further strengthen the framework to finance sustainable development and the means of implementation for the universal post-2015 development agenda; and to reinvigorate and strengthen the financing for development follow-up process to ensure that the actions to which we commit are implemented and reviewed in an appropriate, inclusive, timely and transparent manner.

3. We recognize that, since the adoption of the Monterrey Consensus, the world has made significant overall progress. Globally, economic activity and financing flows have increased substantially. We have made great progress in mobilizing financial and technical resources for development from an increased number of actors. Advances in science, technology and innovation have enhanced the potential to achieve our development goals. Many countries, including developing countries, have implemented policy frameworks that have contributed to increased mobilization of domestic resources and higher levels of economic growth and social progress. Developing countries' share in world trade has increased and, while debt burdens remain, they have been reduced in many poor countries. These advances have

<sup>1</sup> *Report of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002* (United Nations publication, Sales No. E.02.II.A.7), chap. I, resolution 1, annex.

<sup>2</sup> Resolution 63/239, annex.

contributed to a substantial reduction in the number of people living in extreme poverty and to notable progress towards the achievement of the Millennium Development Goals.

4. Despite these gains, many countries, particularly developing countries, still face considerable challenges, and some have fallen further behind. Inequalities within many countries have increased dramatically. Women, representing half of the world's population, as well as indigenous peoples and the vulnerable, continue to be excluded from participating fully in the economy. While the Monterrey agenda has not yet been fully implemented, new challenges have arisen and enormous unmet needs remain for the achievement of sustainable development. The 2008 world financial and economic crisis exposed risks and vulnerabilities in the international financial and economic system. Global growth rates are now below pre-crisis levels. Shocks from financial and economic crises, conflict, natural disasters and disease outbreaks spread rapidly in our highly interconnected world. Environmental degradation, climate change and other environmental risks threaten to undermine past successes and future prospects. We need to ensure that our development efforts enhance resilience in the face of these threats.

5. Solutions can be found, including through strengthening public policies, regulatory frameworks and finance at all levels, unlocking the transformative potential of people and the private sector and incentivizing changes in financing as well as consumption and production patterns to support sustainable development. We recognize that appropriate incentives, strengthening national and international policy environments and regulatory frameworks and their coherence, harnessing the potential of science, technology and innovation, closing technology gaps and scaling up capacity-building at all levels are essential for the shift towards sustainable development and poverty eradication. We reaffirm the importance of freedom, human rights and national sovereignty, good governance, the rule of law, peace and security, combating corruption at all levels and in all its forms and effective, accountable and inclusive democratic institutions at the subnational, national and international levels as central to enabling the effective, efficient and transparent mobilization and use of resources. We also reaffirm all the principles of the Rio Declaration on Environment and Development.<sup>3</sup>

6. We reaffirm that achieving gender equality, empowering all women and girls, and the full realization of their human rights are essential to achieving sustained, inclusive and equitable economic growth and sustainable development. We reiterate the need for gender mainstreaming, including targeted actions and investments in the formulation and implementation of all financial, economic, environmental and social policies. We recommit to adopting and strengthening sound policies and enforceable legislation and transformative actions for the promotion of gender equality and women's and girls' empowerment at all levels, to ensure women's equal rights, access and opportunities for participation and leadership in the economy and to eliminate gender-based violence and discrimination in all its forms.

7. We recognize that investing in children and youth is critical to achieving inclusive, equitable and sustainable development for present and future generations, and we recognize the need to support countries that face particular challenges to make the requisite investments in this area. We reaffirm the vital importance of promoting and protecting the rights of all children and ensuring that no child is left behind

8. We recognize the importance of addressing the diverse needs and challenges faced by countries in special situations, in particular African countries, least developed countries, landlocked developing countries and small island developing States, as well as the specific challenges facing middle-income countries. We reaffirm that least developed countries, as the most vulnerable group of countries, need enhanced global support to overcome the structural challenges they face for the achievement of the post-2015 development agenda and the sustainable development goals. We reaffirm the need to address the special challenges and needs of landlocked developing countries in structurally transforming their economies, harnessing benefits from international trade and developing efficient transport and transit systems. We further reaffirm that small island developing States remain a special

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<sup>3</sup> *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, vol. I, *Resolutions Adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex I.

case for sustainable development in view of their small size, remoteness, narrow resource and export base and exposure to global environmental challenges. We also reaffirm the need to achieve a positive socioeconomic transformation in Africa and the need to address the diverse and specific development needs of middle-income countries, including combating poverty in all of its forms. In this regard, we support the implementation of relevant strategies and programmes of action, including the Istanbul Declaration and Programme of Action,<sup>4</sup> the SIDS Accelerated Modalities of Action (SAMOA) Pathway<sup>5</sup> and the Vienna Programme of Action for Landlocked Developing Countries for the Decade 2014–2024,<sup>6</sup> and reaffirm the importance of supporting the new development framework, the African Union's Agenda 2063, as well as its 10-year plan of action, as a strategic framework for ensuring a positive socioeconomic transformation in Africa within the next 50 years, and its continental programme embedded in the resolutions of the General Assembly on the New Partnership for Africa's Development (NEPAD). Countries in conflict and post-conflict situations also need special attention. We recognize the development challenge posed by conflict, which not only impedes but can reverse decades of development gains. We recognize the peacebuilding financing gap and the importance of the Peacebuilding Fund. We take note of the principles set out in the New Deal by the Group of Seven Plus, countries that are, or have been, affected by conflict.

9. Cohesive nationally owned sustainable development strategies, supported by integrated national financing frameworks, will be at the heart of our efforts. We reiterate that each country has primary responsibility for its own economic and social development and that the role of national policies and development strategies cannot be overemphasized. We will respect each country's policy space and leadership to implement policies for poverty eradication and sustainable development, while remaining consistent with relevant international rules and commitments. At the same time, national development efforts need to be supported by an enabling international economic environment, including coherent and mutually supporting world trade, monetary and financial systems and strengthened and enhanced global economic governance. Processes to develop and facilitate the availability of appropriate knowledge and technologies globally, as well as capacity-building, are also critical. We commit to pursuing policy coherence and an enabling environment for sustainable development at all levels and by all actors and to reinvigorating the global partnership for sustainable development.

10. The enhanced and revitalized global partnership for sustainable development, led by Governments, will be a vehicle for strengthening international cooperation for implementation of the post-2015 development agenda. Multi-stakeholder partnerships and the resources, knowledge and ingenuity of the private sector, civil society, the scientific community, academia, philanthropy and foundations, parliaments, local authorities, volunteers and other stakeholders will be important to mobilize and share knowledge, expertise, technology and financial resources, complement the efforts of Governments and support the achievement of the sustainable development goals, in particular in developing countries. This global partnership should reflect the fact that the post-2015 development agenda, including the sustainable development goals, is global in nature and universally applicable to all countries while taking into account different national realities, capacities, needs and levels of development and respecting national policies and priorities. We will work with all partners to ensure a sustainable, equitable, inclusive, peaceful and prosperous future for all. We will all be held accountable by future generations for the success and delivery of commitments we make today.

11. Achieving an ambitious post-2015 development agenda, including all the sustainable development goals, will require an equally ambitious, comprehensive, holistic and transformative approach with respect to the means of implementation, combining different means of implementation and integrating the economic, social and environmental dimensions of sustainable development. This should be underpinned by effective, accountable and inclusive institutions, sound policies and good governance at all levels. We will identify actions and address critical gaps relevant to the post-2015 development agenda,

<sup>4</sup> *Report of the Fourth United Nations Conference on the Least Developed Countries, Istanbul, Turkey, 9-13 May 2011 (A/CONF.219/7)*, chap. I and II.

<sup>5</sup> Resolution 69/15, annex.

<sup>6</sup> Resolution 69/137, annex II.

including the sustainable development goals, with an aim to harness their considerable synergies, so that implementation of one will contribute to the progress of others. We have therefore identified a range of cross-cutting areas that build on these synergies.

**12. Delivering social protection and essential public services for all.** To end poverty in all its forms everywhere and finish the unfinished business of the Millennium Development Goals, we commit to a new social compact. In this effort, we will provide fiscally sustainable and nationally appropriate social protection systems and measures for all, including floors, with a focus on those furthest below the poverty line and the vulnerable, persons with disabilities, indigenous persons, children, youth and older persons. We also encourage countries to consider setting nationally appropriate spending targets for quality investments in essential public services for all, including health, education, energy, water and sanitation, consistent with national sustainable development strategies. We will make every effort to meet the needs of all communities through delivering high-quality services that make effective use of resources. We commit to strong international support for these efforts and will explore coherent funding modalities to mobilize additional resources, building on country-led experiences.

**13. Scaling up efforts to end hunger and malnutrition.** It is unacceptable that close to 800 million people are chronically undernourished and do not have access to sufficient, safe and nutritious food. With the majority of the poor living in rural areas, we emphasize the need to revitalize the agricultural sector, promote rural development and ensure food security, notably in developing countries, in a sustainable manner, which will lead to rich payoffs across the sustainable development goals. We will support sustainable agriculture, including forestry, fisheries and pastoralism. We will also take action to fight malnutrition and hunger among the urban poor. Recognizing the enormous investment needs in these areas, we encourage increased public and private investments. In this regard, we recognize the Committee on World Food Security's voluntary Principles for Responsible Investment in Agriculture and Food Systems<sup>7</sup> and the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security.<sup>8</sup> We recognize the efforts of the International Fund for Agricultural Development in mobilizing investment to enable rural people living in poverty to improve their food security and nutrition, raise their incomes and strengthen their resilience. We value the work of the Food and Agriculture Organization of the United Nations (FAO), the World Food Programme and the World Bank and other multilateral development banks. We also recognize the complementary role of social safety nets in ensuring food security and nutrition. In this regard, we welcome the Rome Declaration on Nutrition<sup>9</sup> and the Framework for Action,<sup>10</sup> which can provide policy options and strategies aimed at ensuring food security and nutrition for all. We also commit to increasing public investment, which plays a strategic role in financing research, infrastructure and pro-poor initiatives. We will strengthen our efforts to enhance food security and nutrition and focus our efforts on smallholders and women farmers, as well as on agricultural cooperatives and farmers' networks. We call upon relevant agencies to further coordinate and collaborate in this regard, in accordance with their respective mandates. These efforts must be supported by improving access to markets, enabling domestic and international environments and strengthened collaboration across the many initiatives in this area, including regional initiatives, such as the Comprehensive Africa Agriculture Development Programme. We will also work to significantly reduce post-harvest food loss and waste.

**14. Establishing a new forum to bridge the infrastructure gap.** Investing in sustainable and resilient infrastructure, including transport, energy, water and sanitation for all, is a pre-requisite for achieving many of our goals. To bridge the global infrastructure gap, including the \$1 trillion to \$1.5 trillion annual gap in developing countries, we will facilitate development of sustainable, accessible and resilient quality infrastructure in developing countries through enhanced financial and technical support. We welcome the launch of new infrastructure initiatives aimed at bridging these gaps, including the Asian Infrastructure Investment Bank, the Global Infrastructure Hub, the New Development Bank, the Asia

<sup>7</sup> Food and Agriculture Organization of the United Nations, document C 2015/20, appendix D.

<sup>8</sup> Food and Agriculture Organization of the United Nations, document CL 144/9 (C 2013/20), appendix D.

<sup>9</sup> World Health Organization, document EB 136/8, annex I.

<sup>10</sup> Ibid., annex II.

Pacific Project Preparation Facility, the World Bank Group's Global Infrastructure Facility and the Africa50 Infrastructure Fund, as well as the increase in the capital of the Inter-American Investment Corporation. As a key pillar to meet the sustainable development goals, we call for the establishment of a global infrastructure forum building on existing multilateral collaboration mechanisms, led by the multilateral development banks. This forum will meet periodically to improve alignment and coordination among established and new infrastructure initiatives, multilateral and national development banks, United Nations agencies and national institutions, development partners and the private sector. It will encourage a greater range of voices to be heard, particularly from developing countries, to identify and address infrastructure and capacity gaps in particular in least developed countries, landlocked developing countries, small island developing States and African countries. It will highlight opportunities for investment and cooperation and work to ensure that investments are environmentally, socially and economically sustainable.

**15. Promoting inclusive and sustainable industrialization.** We stress the critical importance of industrial development for developing countries, as a critical source of economic growth, economic diversification and value addition. We will invest in promoting inclusive and sustainable industrial development to effectively address major challenges such as growth and jobs, resources and energy efficiency, pollution and climate change, knowledge-sharing, innovation and social inclusion. In this regard, we welcome relevant cooperation within the United Nations system, including the United Nations Industrial Development Organization (UNIDO), to advance the linkages between infrastructure development, inclusive and sustainable industrialization and innovation.

**16. Generating full and productive employment and decent work for all and promoting micro, small and medium-sized enterprises.** To enable all people to benefit from growth, we will include full and productive employment and decent work for all as a central objective in our national development strategies. We will encourage the full and equal participation of women and men, including persons with disabilities, in the formal labour market. We note that micro, small and medium-sized enterprises, which create the vast majority of jobs in many countries, often lack access to finance. Working with private actors and development banks, we commit to promoting appropriate, affordable and stable access to credit to micro, small and medium-sized enterprises, as well as adequate skills development training for all, particularly for youth and entrepreneurs. We will promote national youth strategies as a key instrument for meeting the needs and aspirations of young people. We also commit to developing and operationalizing, by 2020, a global strategy for youth employment and implementing the International Labour Organization (ILO) Global Jobs Pact.

**17. Protecting our ecosystems for all.** All of our actions need to be underpinned by our strong commitment to protect and preserve our planet and natural resources, our biodiversity and our climate. We commit to coherent policy, financing, trade and technology frameworks to protect, manage and restore our ecosystems, including marine and terrestrial ecosystems, and to promote their sustainable use, build resilience, reduce pollution and combat climate change, desertification and land degradation. We recognize the importance of avoiding harmful activities. Governments, businesses and households will all need to change behaviours, with a view to ensuring sustainable consumption and production patterns. We will promote corporate sustainability, including reporting on environmental, social and governance impacts, to help to ensure transparency and accountability. Public and private investments in innovations and clean technologies will be needed, while keeping in mind that new technologies will not substitute for efforts to reduce waste or efficiently use natural resources.

**18. Promoting peaceful and inclusive societies.** We underline the need to promote peaceful and inclusive societies for achieving sustainable development and to build effective, accountable and inclusive institutions at all levels. Good governance, the rule of law, human rights, fundamental freedoms, equal access to fair justice systems and measures to combat corruption and curb illicit financial flows will be integral to our efforts.

**19.** The post-2015 development agenda, including the sustainable development goals, can be met within the framework of a revitalized global partnership for sustainable development, supported by the concrete policies and actions as outlined in the present Action Agenda.



## II. Action areas

### A. Domestic public resources

20. For all countries, public policies and the mobilization and effective use of domestic resources, underscored by the principle of national ownership, are central to our common pursuit of sustainable development, including achieving the sustainable development goals. Building on the considerable achievements in many countries since Monterrey, we remain committed to further strengthening the mobilization and effective use of domestic resources. We recognize that domestic resources are first and foremost generated by economic growth, supported by an enabling environment at all levels. Sound social, environmental and economic policies, including countercyclical fiscal policies, adequate fiscal space, good governance at all levels and democratic and transparent institutions responsive to the needs of the people, are necessary to achieve our goals. We will strengthen our domestic enabling environments, including the rule of law, and combat corruption at all levels and in all its forms. Civil society, independent media and other non-State actors also play important roles.

21. Evidence shows that gender equality, women's empowerment and women's full and equal participation and leadership in the economy are vital to achieve sustainable development and significantly enhance economic growth and productivity. We commit to promoting social inclusion in our domestic policies. We will promote and enforce non-discriminatory laws, social infrastructure and policies for sustainable development, as well as enable women's full and equal participation in the economy and their equal access to decision-making processes and leadership.

22. We recognize that significant additional domestic public resources, supplemented by international assistance as appropriate, will be critical to realizing sustainable development and achieving the sustainable development goals. We commit to enhancing revenue administration through modernized, progressive tax systems, improved tax policy and more efficient tax collection. We will work to improve the fairness, transparency, efficiency and effectiveness of our tax systems, including by broadening the tax base and continuing efforts to integrate the informal sector into the formal economy in line with country circumstances. In this regard, we will strengthen international cooperation to support efforts to build capacity in developing countries, including through enhanced official development assistance (ODA). We welcome efforts by countries to set nationally defined domestic targets and timelines for enhancing domestic revenue as part of their national sustainable development strategies and will support developing countries in need in reaching these targets.

23. We will redouble efforts to substantially reduce illicit financial flows by 2030, with a view to eventually eliminating them, including by combating tax evasion and corruption through strengthened national regulation and increased international cooperation. We will also reduce opportunities for tax avoidance and consider inserting anti-abuse clauses in all tax treaties. We will enhance disclosure practices and transparency in both source and destination countries, including by seeking to ensure transparency in all financial transactions between Governments and companies to relevant tax authorities. We will make sure that all companies, including multinationals, pay taxes to the Governments of countries where economic activity occurs and value is created, in accordance with national and international laws and policies.

24. We note the report of the High-level Panel on Illicit Financial Flows from Africa. We invite other regions to carry out similar exercises. To help to combat illicit flows, we invite the International Monetary Fund (IMF), the World Bank and the United Nations to assist both source and destination countries. We also invite appropriate international institutions and regional organizations to publish estimates of the volume and composition of illicit financial flows. We will identify, assess and act on money-laundering risks, including through effective implementation of the Financial Action Task Force standards on anti-money-laundering/counter-terrorism financing. At the same time, we will encourage information-sharing among financial institutions to mitigate the potential impact of the anti-money-laundering and combating the financing of terrorism standard on reducing access to financial services.

25. We urge all countries that have not yet done so to ratify and accede to the United Nations Convention against Corruption,<sup>11</sup> and encourage parties to review its implementation. We commit to making the Convention an effective instrument to deter, detect, prevent and counter corruption and bribery, prosecute those involved in corrupt activities and recover and return stolen assets to their country of origin. We encourage the international community to develop good practices on asset return. We support the Stolen Asset Recovery Initiative of the United Nations and the World Bank and other international initiatives that support the recovery of stolen assets. We further urge that regional conventions against corruption be updated and ratified. We will strive to eliminate safe havens that create incentives for transfer abroad of stolen assets and illicit financial flows. We will work to strengthen regulatory frameworks at all levels to further increase transparency and accountability of financial institutions and the corporate sector, as well as public administrations. We will strengthen international cooperation and national institutions to combat money-laundering and financing of terrorism.

26. Countries relying significantly on natural resource exports face particular challenges. We encourage investment in value addition and processing of natural resources and productive diversification, and commit to addressing excessive tax incentives related to these investments, particularly in extractive industries. We reaffirm that every State has and shall freely exercise full permanent sovereignty over all its wealth, natural resources and economic activity. We underline the importance of corporate transparency and accountability of all companies, notably in the extractive industries. We encourage countries to implement measures to ensure transparency, and take note of voluntary initiatives such as the Extractive Industries Transparency Initiative. We will continue to share best practices and promote peer learning and capacity-building for contract negotiations for fair and transparent concession, revenue and royalty agreements and for monitoring the implementation of contracts.

27. We commit to scaling up international tax cooperation. We encourage countries, in accordance with their national capacities and circumstances, to work together to strengthen transparency and adopt appropriate policies, including multinational enterprises reporting country-by-country to tax authorities where they operate; access to beneficial ownership information for competent authorities; and progressively advancing towards automatic exchange of tax information among tax authorities as appropriate, with assistance to developing countries, especially the least developed, as needed. Tax incentives can be an appropriate policy tool. However, to end harmful tax practices, countries can engage in voluntary discussions on tax incentives in regional and international forums.

28. We stress that efforts in international tax cooperation should be universal in approach and scope and should fully take into account the different needs and capacities of all countries, in particular least developed countries, landlocked developing countries, small island developing States and African countries. We welcome the participation of developing countries or their regional networks in this work, and call for more inclusiveness to ensure that these efforts benefit all countries. We welcome ongoing efforts, including the work of the Global Forum on Transparency and Exchange of Information for Tax Purposes, and take into account the work of the Organization for Economic Cooperation and Development (OECD) for the Group of 20 on base erosion and profit shifting. We support strengthening of regional networks of tax administrators. We take note of ongoing efforts, such as those of IMF, including on capacity-building, and the OECD Tax Inspectors without Borders initiative. We recognize the need for technical assistance through multilateral, regional, bilateral and South-South cooperation, based on different needs of countries.

29. We emphasize the importance of inclusive cooperation and dialogue among national tax authorities on international tax matters. In this regard, we welcome the work of the Committee of Experts on International Cooperation in Tax Matters, including its subcommittees. We have decided that we will work to further enhance its resources in order to strengthen its effectiveness and operational capacity. To that end, we will increase the frequency of its meetings to two sessions per year, with a duration of four working days each. We will increase the engagement of the Committee with the Economic and Social Council through the special meeting on international cooperation in tax matters, with a view to

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<sup>11</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

enhancing intergovernmental consideration of tax issues. Members of the Committee will continue to report directly to the Economic and Social Council. We continue to urge Member States to support the Committee and its subsidiary bodies through the voluntary trust fund, to enable the Committee to fulfil its mandate, including supporting the increased participation of developing country experts at subcommittee meetings. The Committee members shall be nominated by Governments and acting in their expert capacity, who are to be drawn from the fields of tax policy and tax administration and who are to be selected to reflect an adequate equitable geographical distribution, representing different tax systems. The members shall be appointed by the Secretary-General, in consultation with Member States.

30. We will strengthen national control mechanisms, such as supreme audit institutions, along with other independent oversight institutions, as appropriate. We will increase transparency and equal participation in the budgeting process and promote gender responsive budgeting and tracking. We will establish transparent public procurement frameworks as a strategic tool to reinforce sustainable development. We take note of the work of the Open Government Partnership, which promotes the transparency, accountability and responsiveness of Governments to their citizens, with the goal of improving the quality of governance and government services.

31. We reaffirm the commitment to rationalize inefficient fossil-fuel subsidies that encourage wasteful consumption by removing market distortions, in accordance with national circumstances, including by restructuring taxation and phasing out those harmful subsidies, where they exist, to reflect their environmental impacts, taking fully into account the specific needs and conditions of developing countries and minimizing the possible adverse impacts on their development in a manner that protects the poor and the affected communities.

32. We note the enormous burden that non-communicable diseases place on developed and developing countries. These costs are particularly challenging for small island developing States. We recognize, in particular, that, as part of a comprehensive strategy of prevention and control, price and tax measures on tobacco can be an effective and important means to reduce tobacco consumption and health-care costs and represent a revenue stream for financing for development in many countries.

33. We note the role that well-functioning national and regional development banks can play in financing sustainable development, particularly in credit market segments in which commercial banks are not fully engaged and where large financing gaps exist, based on sound lending frameworks and compliance with appropriate social and environmental safeguards. This includes areas such as sustainable infrastructure, energy, agriculture, industrialization, science, technology and innovation, as well as financial inclusion and financing of micro, small and medium-sized enterprises. We acknowledge that national and regional development banks also play a valuable countercyclical role, especially during financial crises when private sector entities become highly risk-averse. We call upon national and regional development banks to expand their contributions in these areas, and further urge relevant international public and private actors to support such banks in developing countries.

34. We further acknowledge that expenditures and investments in sustainable development are being devolved to the subnational level, which often lacks adequate technical and technological capacity, financing and support. We therefore commit to scaling up international cooperation to strengthen capacities of municipalities and other local authorities. We will support cities and local authorities of developing countries, particularly in least developed countries and small island developing States, in implementing resilient and environmentally sound infrastructure, including energy, transport, water and sanitation, and sustainable and resilient buildings using local materials. We will strive to support local governments in their efforts to mobilize revenues as appropriate. We will enhance inclusive and sustainable urbanization and strengthen economic, social and environmental links between urban, peri-urban and rural areas by strengthening national and regional development planning, within the context of national sustainable development strategies. We will work to strengthen debt management, and where appropriate to establish or strengthen municipal bond markets, to help subnational authorities to finance necessary investments. We will also promote lending from financial institutions and development

banks, along with risk mitigation mechanisms, such as the Multilateral Investment Guarantee Agency, while managing currency risk. In these efforts, we will encourage the participation of local communities in decisions affecting their communities, such as in improving drinking water and sanitation management. By 2020, we will increase the number of cities and human settlements adopting and implementing integrated policies and plans towards inclusion, resource efficiency, mitigation and adaptation to climate change and resilience to disasters. We will develop and implement holistic disaster risk management at all levels in line with the Sendai Framework.<sup>12</sup> In this regard, we will support national and local capacity for prevention, adaptation and mitigation of external shocks and risk management.

## **B. Domestic and international private business and finance**

35. Private business activity, investment and innovation are major drivers of productivity, inclusive economic growth and job creation. We acknowledge the diversity of the private sector, ranging from microenterprises to cooperatives to multinationals. We call upon all businesses to apply their creativity and innovation to solving sustainable development challenges. We invite them to engage as partners in the development process, to invest in areas critical to sustainable development and to shift to more sustainable consumption and production patterns. We welcome the significant growth in domestic private activity and international investment since Monterrey. Private international capital flows, particularly foreign direct investment, along with a stable international financial system, are vital complements to national development efforts. Nonetheless, we note that there are investment gaps in key sectors for sustainable development. Foreign direct investment is concentrated in a few sectors in many developing countries and often bypasses countries most in need and international capital flows are often short-term oriented.

36. We will develop policies and, where appropriate, strengthen regulatory frameworks to better align private sector incentives with public goals, including incentivizing the private sector to adopt sustainable practices, and foster long-term quality investment. Public policy is needed to create the enabling environment at all levels and a regulatory framework necessary to encourage entrepreneurship and a vibrant domestic business sector. Monterrey tasked us to build transparent, stable and predictable investment climates, with proper contract enforcement and respect for property rights, embedded in sound macroeconomic policies and institutions. Many countries have made great strides in this area. We will continue to promote and create enabling domestic and international conditions for inclusive and sustainable private sector investment, with transparent and stable rules and standards and free and fair competition, conducive to achieving national development policies.

37. We will foster a dynamic and well-functioning business sector, while protecting labour rights and environmental and health standards in accordance with relevant international standards and agreements, such as the Guiding Principles on Business and Human Rights<sup>13</sup> and the labour standards of ILO, the Convention on the Rights of the Child<sup>14</sup> and key multilateral environmental agreements, for parties to these agreements. We welcome the growing number of businesses that embrace a core business model that takes account of the environmental, social and governance impacts of their activities, and urge all others to do so. We encourage impact investing, which combines a return on investment with non-financial impacts. We will promote sustainable corporate practices, including integrating environmental, social and governance factors into company reporting as appropriate, with countries deciding on the appropriate balance of voluntary and mandatory rules. We encourage businesses to adopt principles for responsible business and investing, and we support the work of the Global Compact in this regard. We will work towards harmonizing the various initiatives on sustainable business and financing, identifying gaps, including in relation to gender equality, and strengthening the mechanisms and incentives for compliance.

38. We acknowledge the importance of robust risk-based regulatory frameworks for all financial intermediation, from microfinance to international banking. We acknowledge that some risk-mitigating measures could potentially have unintended consequences, such as

<sup>12</sup> Resolution 69/283, annex II.

<sup>13</sup> A/HRC/17/31, annex.

<sup>14</sup> United Nations, *Treaty Series*, vol. 1577, No. 27531.

making it more difficult for micro, small and medium-sized enterprises to access financial services. We will work to ensure that our policy and regulatory environment supports financial market stability and promotes financial inclusion in a balanced manner and with appropriate consumer protection. We will endeavour to design policies, including capital market regulations where appropriate, that promote incentives along the investment chain that are aligned with long-term performance and sustainability indicators and that reduce excess volatility.

39. Many people, especially women, still lack access to financial services, as well as financial literacy, which is a key for social inclusion. We will work towards full and equal access to formal financial services for all. We will adopt or review our financial inclusion strategies, in consultation with relevant stakeholders, and will consider including financial inclusion as a policy objective in financial regulation, in accordance with national priorities and legislation. We will encourage our commercial banking systems to serve all, including those who currently face barriers to access financial services and information. We will also support microfinance institutions, development banks, agricultural banks, mobile network operators, agent networks, cooperatives, postal banks and savings banks as appropriate. We encourage the use of innovative tools, including mobile banking, payment platforms and digitalized payments. We will expand peer learning and experience-sharing among countries and regions, including through the Alliance for Financial Inclusion and regional organizations. We commit to strengthening capacity development for developing countries, including through the United Nations development system, and encourage mutual cooperation and collaboration between financial inclusion initiatives.

40. We recognize the positive contribution of migrants for inclusive growth and sustainable development in countries of origin and transit and destination countries. Remittances from migrant workers, half of whom are women, are typically wages transferred to families, primarily to meet part of the needs of the recipient households. They cannot be equated to other international financial flows, such as foreign direct investment, ODA or other public sources of financing for development. We will work to ensure that adequate and affordable financial services are available to migrants and their families in both home and host countries. We will work towards reducing the average transaction cost of migrant remittances by 2030 to less than 3 per cent of the amount transferred. We are particularly concerned with the cost of remittances in certain low-volume and high-cost corridors. We will work to ensure that no remittance corridor requires charges higher than 5 per cent by 2030, mindful of the need to maintain adequate service coverage, especially for those most in need. We will support national authorities to address the most significant obstacles to the continued flow of remittances, such as the trend of banks withdrawing services, to work towards access to remittance transfer services across borders. We will increase coordination among national regulatory authorities to remove obstacles to non-bank remittance service providers accessing payment system infrastructure and promote conditions for cheaper, faster and safer transfer of remittances in both source and recipient countries, including by promoting competitive and transparent market conditions. We will exploit new technologies, promote financial literacy and inclusion and improve data collection.

41. We are committed to women's and girls' equal rights and opportunities in political and economic decision-making and resource allocation and to removing any barriers that prevent women from being full participants in the economy. We resolve to undertake legislation and administrative reforms to give women equal rights with men to economic resources, including access to ownership and control over land and other forms of property, credit, inheritance, natural resources and appropriate new technology. We further encourage the private sector to contribute to advancing gender equality through striving to ensure women's full and productive employment and decent work, equal pay for equal work or work of equal value and equal opportunities, as well as protecting them against discrimination and abuse in the workplace. We support the Women's Empowerment Principles established by UN-Women and the Global Compact, and encourage increased investments in female-owned companies or businesses.

42. We welcome the rapid growth of philanthropic giving and the significant financial and non-financial contribution philanthropists have made towards achieving our common goals. We recognize philanthropic donors' flexibility and capacity for innovation and taking risks and their ability to leverage additional funds through multi-stakeholder partnerships. We

encourage others to join those who already contribute. We welcome efforts to increase cooperation between philanthropic actors, Governments and other development stakeholders. We call for increased transparency and accountability in philanthropy. We encourage philanthropic donors to give due consideration to local circumstances and align with national policies and priorities. We also encourage philanthropic donors to consider managing their endowments through impact investment, which considers both profit and non-financial impacts in its investment criteria.

43. We recognize that micro, small and medium-sized enterprises, particularly those that are women-owned, often have difficulty in obtaining financing. To encourage increased lending to micro, small and medium-sized enterprises, financial regulations can permit the use of collateral substitutes, create appropriate exceptions to capital requirements, reduce entry and exit costs to encourage competition and allow microfinance institutions to mobilize savings by receiving deposits. We will work to strengthen the capacity of financial institutions to undertake cost-effective credit evaluation, including through public training programmes, and through establishing credit bureaux where appropriate. National development banks, credit unions and other domestic financial institutions can play a vital role in providing access to financial services. We encourage both international and domestic development banks to promote finance for micro, small and medium-sized enterprises, including in industrial transformation, through the creation of credit lines targeting those enterprises, as well as technical assistance. We welcome the work of the International Finance Corporation and other initiatives in this area, and encourage increased capacity-building and knowledge-sharing at the regional and global levels. We also recognize the potential of new investment vehicles, such as development-oriented venture capital funds, potentially with public partners, blended finance, risk mitigation instruments and innovative debt funding structures with appropriate risk management and regulatory frameworks. We will also enhance capacity-building in these areas.

44. To meet longer-term financing needs, we will work towards developing domestic capital markets, particularly long-term bond and insurance markets where appropriate, including crop insurance on non-distortive terms. We will also work to strengthen supervision, clearing, settlement and risk management. We underline that regional markets are an effective way to achieve scale and depth not attainable when individual markets are small. We welcome the increase in lending in domestic currencies by multilateral development banks, and encourage further growth in this area. We encourage development banks to make use of all risk management tools, including through diversification. We recognize that the nature of international portfolio investment has evolved over the past 15 years, and that foreign investors now play a significant role in some developing countries' capital markets, and the importance of managing volatility associated with these. We will enhance international support in developing domestic capital markets in developing countries, in particular in least developed countries, landlocked developing countries and small island developing States. We will work to strengthen capacity-building in this area, including through regional, interregional and global forums for knowledge-sharing, technical assistance and data-sharing.

45. We recognize the important contribution that direct investment, including foreign direct investment, can make to sustainable development, particularly when projects are aligned with national and regional sustainable development strategies. Government policies can strengthen positive spillovers from foreign direct investment, such as know-how and technology, including through establishing linkages with domestic suppliers, as well as encouraging the integration of local enterprises, in particular micro, small and medium-sized enterprises in developing countries, into regional and global value chains. We will encourage investment promotion and other relevant agencies to focus on project preparation. We will prioritize projects with the greatest potential for promoting full and productive employment and decent work for all, sustainable patterns of production and consumption, structural transformation and sustainable industrialization, productive diversification and agriculture. Internationally, we will support these efforts through financial and technical support and capacity-building and closer collaboration between home and host country agencies. We will consider the use of insurance, investment guarantees, including through the Multilateral Investment Guarantee Agency, and new financial instruments to incentivize foreign direct investment to developing countries, particularly least developed countries, landlocked

developing countries, small island developing States and countries in conflict and post-conflict situations.

46. We note with concern that many least developed countries continue to be largely sidelined by foreign direct investment that could help to diversify their economies, despite improvements in their investment climates. We resolve to adopt and implement investment promotion regimes for least developed countries. We will also offer financial and technical support for project preparation and contract negotiation, advisory support in investment-related dispute resolution, access to information on investment facilities and risk insurance and guarantees such as through the Multilateral Investment Guarantee Agency, as requested by the least developed countries. We also note that small island developing States face challenges accessing international credit as a result of the structural characteristics of their economies. Least developed countries will continue to improve their enabling environments. We will also strengthen our efforts to address financing gaps and low levels of direct investment faced by landlocked developing countries, small island developing States, many middle-income countries and countries in conflict and post-conflict situations. We encourage the use of innovative mechanisms and partnerships to encourage greater international private financial participation in these economies.

47. We acknowledge that impediments to private investment in infrastructure exist on both the supply and demand side. Insufficient investment is due in part to inadequate infrastructure plans and an insufficient number of well-prepared investable projects, along with private sector incentive structures that are not necessarily appropriate for investing in many long-term projects, and risk perceptions of investors. To address these constraints, we will imbed resilient and quality infrastructure investment plans in our national sustainable development strategies, while also strengthening our domestic enabling environments. Internationally, we will provide technical support for countries to translate plans into concrete project pipelines, as well as for individual implementable projects, including for feasibility studies, negotiation of complex contracts and project management. In this regard, we take note of the African Union's Programme for Infrastructure Development in Africa. We note with concern the decline in infrastructure lending from commercial banks. We call upon standard-setting bodies to identify adjustments that could encourage long-term investments within a framework of prudent risk-taking and robust risk control. We encourage long-term institutional investors, such as pension funds and sovereign wealth funds, which manage large pools of capital, to allocate a greater percentage to infrastructure, particularly in developing countries. In this regard, we encourage investors to take measures to incentivize greater long-term investment such as reviews of compensation structures and performance criteria.

48. We recognize that both public and private investment have key roles to play in infrastructure financing, including through development banks, development finance institutions and tools and mechanisms such as public-private partnerships, blended finance, which combines concessional public finance with non-concessional private finance and expertise from the public and private sector, special-purpose vehicles, non-recourse project financing, risk mitigation instruments and pooled funding structures. Blended finance instruments including public-private partnerships serve to lower investment-specific risks and incentivize additional private sector finance across key development sectors led by regional, national and subnational government policies and priorities for sustainable development. For harnessing the potential of blended finance instruments for sustainable development, careful consideration should be given to the appropriate structure and use of blended finance instruments. Projects involving blended finance, including public-private partnerships, should share risks and reward fairly, include clear accountability mechanisms and meet social and environmental standards. We will therefore build capacity to enter into public-private partnerships, including with regard to planning, contract negotiation, management, accounting and budgeting for contingent liabilities. We also commit to hold inclusive, open and transparent discussion when developing and adopting guidelines and documentation for the use of public-private partnerships and to build a knowledge base and share lessons learned through regional and global forums.

49. We will promote both public and private investment in energy infrastructure and clean energy technologies including carbon capture and storage technologies. We will substantially increase the share of renewable energy and double the global rate of energy

efficiency and conservation, with the aim of ensuring universal access to affordable, reliable, modern and sustainable energy services for all by 2030. We will enhance international cooperation to provide adequate support and facilitate access to clean energy research and technology, expand infrastructure and upgrade technology for supplying modern and sustainable energy services to all developing countries, in particular least developed countries and small island developing States. We welcome the Secretary-General's Sustainable Energy for All initiative as a useful framework, including its regional hubs, and the development of action agendas and investment prospectuses at country level, where appropriate. We call for action on its recommendations, with a combined potential to raise over \$100 billion in annual investments by 2020, through market-based initiatives, partnerships and leveraging development banks. We recognize the special vulnerabilities and needs of small island developing States, least developed countries and landlocked developing countries and welcome Power Africa, the NEPAD Africa Power Vision and the Global Renewable Energy Islands Network of the International Renewable Energy Agency (IRENA).

### C. International development cooperation

50. International public finance plays an important role in complementing the efforts of countries to mobilize public resources domestically, especially in the poorest and most vulnerable countries with limited domestic resources. Our ambitious agenda puts significant demands on public budgets and capacities, which requires scaled-up and more effective international support, including both concessional and non-concessional financing. We welcome the increase of all forms of international public finance since Monterrey and are determined to step up our respective efforts in support of the post-2015 development agenda. We recognize that we share common goals and common ambitions to strengthen international development cooperation and maximize its effectiveness, transparency, impact and results. In this regard, we welcome the progress achieved in elaborating the principles that apply to our respective efforts to increase the impact of our cooperation. We will continue to strengthen our dialogue to enhance our common understanding and improve knowledge-sharing.

51. We welcome the increase in volume of ODA since Monterrey. Nonetheless, we express our concern that many countries still fall short of their ODA commitments and we reiterate that the fulfilment of all ODA commitments remains crucial. ODA providers reaffirm their respective ODA commitments, including the commitment by many developed countries to achieve the target of 0.7 per cent of gross national income for official development assistance (ODA/GNI) and 0.15 to 0.20 per cent of ODA/GNI to least developed countries. We are encouraged by those few countries that have met or surpassed their commitment to 0.7 per cent of ODA/GNI and the target of 0.15 to 0.20 per cent of ODA/GNI to least developed countries. We urge all others to step up efforts to increase their ODA and to make additional concrete efforts towards the ODA targets. We welcome the decision by the European Union which reaffirms its collective commitment to achieve the 0.7 per cent of ODA/GNI target within the time frame of the post-2015 agenda and undertakes to meet collectively the target of 0.15 to 0.20 per cent of ODA/GNI to least developed countries in the short term and to reach 0.20 per cent of ODA/GNI to least developed countries within the time frame of the post-2015 agenda. We encourage ODA providers to consider setting a target to provide at least 0.20 per cent of ODA/GNI to least developed countries.

52. We recognize the importance of focusing the most concessional resources on those with the greatest needs and least ability to mobilize other resources. In this regard, we note with great concern the decline in the share of ODA to least developed countries and commit to reversing this decline. We are encouraged by those who are allocating at least 50 per cent of their ODA to least developed countries.

53. We stress the importance of mobilizing greater domestic support towards the fulfilment of ODA commitments, including through raising public awareness, and providing data on aid effectiveness and demonstrating tangible results. We encourage partner countries to build on progress achieved in ensuring that ODA is used effectively to help to achieve development goals and targets. We encourage the publication of forward-looking plans which increase clarity, predictability and transparency of future development cooperation,



in accordance with national budget allocation processes. We urge countries to track and report resource allocations for gender equality and women's empowerment.

54. An important use of international public finance, including ODA, is to catalyse additional resource mobilization from other sources, public and private. It can support improved tax collection and help to strengthen domestic enabling environments and build essential public services. It can also be used to unlock additional finance through blended or pooled financing and risk mitigation, notably for infrastructure and other investments that support private sector development.

55. We will hold open, inclusive and transparent discussions on the modernization of the ODA measurement and on the proposed measure of "total official support for sustainable development" and we affirm that any such measure will not dilute commitments already made.

56. South-South cooperation is an important element of international cooperation for development as a complement, not a substitute, to North-South cooperation. We recognize its increased importance, different history and particularities and stress that South-South cooperation should be seen as an expression of solidarity among peoples and countries of the South, based on their shared experiences and objectives. It should continue to be guided by the principles of respect for national sovereignty, national ownership and independence, equality, non-conditionality, non-interference in domestic affairs and mutual benefit.

57. We welcome the increased contributions of South-South cooperation to poverty eradication and sustainable development. We encourage developing countries to voluntarily step up their efforts to strengthen South-South cooperation and to further improve its development effectiveness in accordance with the provisions of the Nairobi outcome document of the High-level United Nations Conference on South-South Cooperation.<sup>15</sup> We also commit to strengthening triangular cooperation as a means of bringing relevant experience and expertise to bear in development cooperation.

58. We welcome continued efforts to improve the quality, impact and effectiveness of development cooperation and other international efforts in public finance, including adherence to agreed development cooperation effectiveness principles. We will align activities with national priorities, including by reducing fragmentation, accelerating the untying of aid, particularly for least developed countries and countries most in need. We will promote country ownership and results orientation and strengthen country systems, use programme-based approaches where appropriate, strengthen partnerships for development, reduce transaction costs and increase transparency and mutual accountability. We will make development more effective and predictable by providing developing countries with regular and timely indicative information on planned support in the medium term. We will pursue these efforts in the Development Cooperation Forum of the Economic and Social Council and, in this regard, we also take account of efforts in other relevant forums, such as the Global Partnership for Effective Development Cooperation, in a complementary manner. We will also consider not requesting tax exemptions on goods and services delivered as government-to-government aid, beginning with renouncing repayments of value-added taxes and import levies.

59. We acknowledge that the United Nations Framework Convention on Climate Change<sup>16</sup> and the Conference of the Parties thereto is the primary international, intergovernmental forum for negotiating the global response to climate change. We welcome the Lima Call for Climate Action<sup>17</sup> and we are encouraged by the commitment of the Conference of the Parties to reaching an ambitious agreement in Paris in 2015 that is applicable to all parties and that reflects the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

60. We reaffirm the importance of meeting in full existing commitments under international conventions, including on climate change and related global challenges. We recognize that funding from all sources, including public and private, bilateral and multilateral, as well as alternative sources of finance, will need to be stepped up for

<sup>15</sup> Resolution 64/222, annex.

<sup>16</sup> United Nations, *Treaty Series*, vol. 1771, No. 30822.

<sup>17</sup> FCCC/CP/2014/10/Add.1.

investments in many areas, including for low-carbon and climate resilient development. We recognize that, in the context of meaningful mitigation actions and transparency on implementation, developed countries committed to a goal of mobilizing jointly \$100 billion a year by 2020 from a wide variety of sources to address the needs of developing countries. We recognize the need for transparent methodologies for reporting climate finance and welcome the ongoing work in the context of the United Nations Framework Convention on Climate Change.

61. We welcome the successful and timely initial resource mobilization process of the Green Climate Fund, making it the largest dedicated climate fund and enabling it to start its activities in supporting developing country parties to the United Nations Framework Convention on Climate Change. We welcome the decision of the Board of the Green Climate Fund to aim to start taking decisions on the approval of projects and programmes no later than its third meeting in 2015, as well as its decision regarding the formal replenishment process for the Fund. We also welcome the Board's decision to aim for a 50:50 balance between mitigation and adaptation over time on a grant equivalent basis and to aim for a floor of 50 per cent of the adaptation allocation for particularly vulnerable countries, including least developed countries, small island developing States and African countries. We note the importance of continued support to address remaining gaps in the capacity to gain access to and manage climate finance.

62. We acknowledge the importance of taking into account the three dimensions of sustainable development. We encourage consideration of climate and disaster resilience in development financing to ensure the sustainability of development results. We recognize that well-designed actions can produce multiple local and global benefits, including those related to climate change. We commit to investing in efforts to strengthen the capacity of national and local actors to manage and finance disaster risk, as part of national sustainable development strategies, and to ensure that countries can draw on international assistance when needed.

63. We acknowledge the critical importance of biodiversity and the sustainable use of its components in poverty eradication and sustainable development. We welcome the implementation of the global Strategic Plan for Biodiversity 2011–2020 and its Aichi Biodiversity Targets<sup>18</sup> by the parties to the Convention on Biological Diversity,<sup>19</sup> and we invite all parties to attend the thirteenth meeting of the Conference of the Parties, to be held in Mexico in 2016. We encourage the mobilization of financial resources from all sources and at all levels to conserve and sustainably use biodiversity and ecosystems, including promoting sustainable land management, combating desertification, drought, dust storms and floods, restoring degraded land and soil and promoting sustainable forest management. We welcome the commitment of States parties to the United Nations Convention to Combat Desertification<sup>20</sup> to support and strengthen its implementation. We commit to supporting the efforts of countries to advance conservation and restoration efforts, such as the African Union Great Green Wall Initiative, and to providing support to countries in need to enhance the implementation of their national biodiversity strategies and action plans.

64. We recognize that oceans, seas and coastal areas form an integrated and essential component of the Earth's ecosystem and are critical to sustaining it and that international law, as reflected in the United Nations Convention on the Law of the Sea,<sup>21</sup> provides the legal framework for the conservation and the sustainable use of the oceans and their resources. We stress the importance of the conservation and sustainable use of the oceans and seas and of their resources for sustainable development, including through the contributions to poverty eradication, sustained economic growth, food security, creation of sustainable livelihoods and decent work, while at the same time protecting biodiversity and the marine environment and addressing the impacts of climate change. We therefore commit to protecting, and restoring, the health, productivity and resilience of oceans and marine ecosystems and to maintaining their biodiversity, enabling their conservation and sustainable

<sup>18</sup> See United Nations Environment Programme, document UNEP/CBD/COP/10/27, annex, decision X/2.

<sup>19</sup> United Nations, *Treaty Series*, vol. 1760, No. 30619.

<sup>20</sup> *Ibid.*, vol. 1954, No. 33480.

<sup>21</sup> *Ibid.*, vol. 1833, No. 31363.

use for present and future generations, and to effectively applying an ecosystem approach and the precautionary approach in the management, in accordance with international law, of activities impacting on the marine environment, to deliver on all three dimensions of sustainable development.

65. We acknowledge that increases in global temperature, sea-level rise, ocean acidification and other climate change impacts are seriously affecting coastal areas and low-lying coastal countries, including many least developed countries and small island developing States, while extreme climate events endanger the lives and livelihoods of millions. We commit to enhanced support to the most vulnerable in addressing and adapting to these critical challenges.

66. Development finance can contribute to reducing social, environmental and economic vulnerabilities and enable countries to prevent or combat situations of chronic crisis related to conflicts or natural disasters. We recognize the need for the coherence of developmental and humanitarian finance to ensure more timely, comprehensive, appropriate and cost-effective approaches to the management and mitigation of natural disasters and complex emergencies. We commit to promoting innovative financing mechanisms to allow countries to better prevent and manage risks and develop mitigation plans. We will invest in efforts to strengthen the capacity of national and local actors to manage and finance disaster risk reduction and to enable countries to draw efficiently and effectively on international assistance when needed. We take note of the establishment of the Secretary-General's High-level Panel on Humanitarian Financing and the World Humanitarian Summit to be held in Istanbul, Turkey, on 23 and 24 May 2016.

67. We recognize the major challenge to the achievement of durable peace and sustainable development in countries in conflict and post-conflict situations. We recognize the peacebuilding financing gap and the role played by the Peacebuilding Fund. We will step up our efforts to assist countries in accessing financing for peacebuilding and development in the post-conflict context. We recognize the need for aid to be delivered efficiently through simplified mechanisms, increased strengthening and use of country systems, as well as strengthening of the capacity of local and national institutions as a priority in conflict-affected and post-conflict States, while stressing the importance of country ownership and leadership in both peacebuilding and development.

68. We welcome ongoing work in relevant institutions to support efforts by least developed countries, landlocked developing countries and small island developing States to build their national capacity to respond to various kinds of shocks, including financial crisis, natural disasters and public health emergencies, including through funds and other tools.

69. We welcome the progress made since Monterrey to develop and mobilize support for innovative sources and mechanisms of additional financing, in particular by the Leading Group on Innovative Financing for Development. We invite more countries to voluntarily join in implementing innovative mechanisms, instruments and modalities which do not unduly burden developing countries. We encourage consideration of how existing mechanisms, such as the International Finance Facility for Immunization, might be replicated to address broader development needs. We also encourage exploring additional innovative mechanisms based on models combining public and private resources such as green bonds, vaccine bonds, triangular loans and pull mechanisms and carbon pricing mechanisms.

70. We recognize the significant potential of multilateral development banks and other international development banks in financing sustainable development and providing know-how. Multilateral development banks can provide countercyclical lending, including on concessional terms as appropriate, to complement national resources for financial and economic shocks, natural disasters and pandemics. We invite the multilateral development banks and other international development banks to continue providing both concessional and non-concessional stable, long-term development finance by leveraging contributions and capital and by mobilizing resources from capital markets. We stress that development banks should make optimal use of their resources and balance sheets, consistent with maintaining their financial integrity, and should update and develop their policies in support of the post-2015 development agenda, including the sustainable development goals. We encourage the multilateral development finance institutions to establish a process to examine

their own role, scale and functioning to enable them to adapt and be fully responsive to the sustainable development agenda.

71. We recognize that middle-income countries still face significant challenges to achieve sustainable development. In order to ensure that achievements made to date are sustained, efforts to address ongoing challenges should be strengthened through the exchange of experiences, improved coordination and better and focused support of the United Nations development system, the international financial institutions, regional organizations and other stakeholders. We therefore request those stakeholders to ensure that the diverse and specific development needs of middle-income countries are appropriately considered and addressed, in a tailored fashion, in their relevant strategies and policies with a view to promoting a coherent and comprehensive approach towards individual countries. We also acknowledge that ODA and other concessional finance is still important for a number of these countries and has a role to play for targeted results, taking into account the specific needs of these countries.

72. We also recognize the need to devise methodologies to better account for the complex and diverse realities of middle-income countries. We note with concern that access to concessional finance is reduced as countries' incomes grow and that countries may not be able to access sufficient affordable financing from other sources to meet their needs. We encourage shareholders in multilateral development banks to develop graduation policies that are sequenced, phased and gradual. We also encourage multilateral development banks to explore ways to ensure that their assistance best addresses the opportunities and challenges presented by the diverse circumstances of middle-income countries. In this regard, we acknowledge the World Bank's small island State exception as a noteworthy response to the financing challenges of small island developing States. We also underscore the importance of risk mitigation mechanisms, including through the Multilateral Investment Guarantee Agency.

73. We recognize that the graduation process of least developed countries should be coupled with appropriate measures, so that the development process will not be jeopardized and that progress towards the sustainable development goals will be sustained. We further note that the level of concessionality of international public finance should take into account the level of development of each recipient, including income level, institutional capacity and vulnerability, as well as the nature of the project to be funded, including the commercial viability.

74. We underline the important role and comparative advantage of an adequately resourced, relevant, coherent, efficient and effective United Nations system in its support to achieve the sustainable development goals and sustainable development, and support the process on the longer-term positioning of the United Nations development system in the context of the post-2015 development agenda. We will work to strengthen national ownership and leadership over the operational activities for development of the United Nations system in programme countries, United Nations coherence, relevance, effectiveness and efficiency, to improve coordination and results, including through achieving further progress on the "Delivering as one" voluntary approach, among other operational modalities and approaches, and to improve United Nations collaboration with relevant stakeholders and partners.

75. Development banks can play a particularly important role in alleviating constraints on financing development, including quality infrastructure investment, including for sub-sovereign loans. We welcome efforts by new development banks to develop safeguard systems in open consultation with stakeholders on the basis of established international standards, and encourage all development banks to establish or maintain social and environmental safeguards systems, including on human rights, gender equality and women's empowerment, that are transparent, effective, efficient and time-sensitive. We encourage multilateral development banks to further develop instruments to channel the resources of long-term investors towards sustainable development, including through long-term infrastructure and green bonds. We underline that regional investments in key priority sectors require the expansion of new financing mechanisms, and call upon multilateral and regional development finance institutions to support regional and subregional organizations and programmes.

76. We recognize that genuine, effective and durable multi-stakeholder partnerships can play an important role in advancing sustainable development. We will encourage and promote such partnerships to support country-driven priorities and strategies, building on lessons learned and available expertise. We further recognize that partnerships are effective instruments for mobilizing human and financial resources, expertise, technology and knowledge. We acknowledge the role of the Global Environment Facility (GEF) in mainstreaming environmental concerns into development efforts and providing grant and concessional resources to support environmental projects in developing countries. We support building capacity in developing countries, especially least developed countries and small island developing States, to access available funds, and aim to enhance public and private contributions to GEF.

77. Multi-stakeholder partnerships, such as the Global Alliance for Vaccines and Immunization (Gavi) and the Global Fund to Fight AIDS, Tuberculosis and Malaria, have also achieved results in the field of health. We encourage a better alignment between such initiatives, and encourage them to improve their contribution to strengthening health systems. We recognize the key role of the World Health Organization as the directing and coordinating authority on international health work. We will enhance international coordination and enabling environments at all levels to strengthen national health systems and achieve universal health coverage. We commit to strengthening the capacity of countries, in particular developing countries, for early warning, risk reduction and management of national and global health risks, as well as to substantially increase health financing and the recruitment, development, training and retention of the health workforce in developing countries, especially in least developed countries and small island developing States. Parties to the World Health Organization Framework Convention on Tobacco Control<sup>22</sup> will also strengthen implementation of the Convention in all countries, as appropriate, and will support mechanisms to raise awareness and mobilize resources. We welcome innovative approaches to catalyse additional domestic and international private and public resources for women and children, who have been disproportionately affected by many health issues, including the expected contribution of the Global Financing Facility in support of Every Woman, Every Child.

78. We recognize the importance for achieving sustainable development of delivering quality education to all girls and boys. This will require reaching children living in extreme poverty, children with disabilities, migrant and refugee children, and those in conflict and post-conflict situations, and providing safe, non-violent, inclusive and effective learning environments for all. We will scale up investments and international cooperation to allow all children to complete free, equitable, inclusive and quality early childhood, primary and secondary education, including through scaling up and strengthening initiatives, such as the Global Partnership for Education. We commit to upgrading education facilities that are child, disability and gender sensitive and increasing the percentage of qualified teachers in developing countries, including through international cooperation, especially in least developed countries and small island developing States.

#### **D. International trade as an engine for development**

79. International trade is an engine for inclusive economic growth and poverty reduction and contributes to the promotion of sustainable development. We will continue to promote a universal, rules-based, open, transparent, predictable, inclusive, non-discriminatory and equitable multilateral trading system under the World Trade Organization (WTO), as well as meaningful trade liberalization. Such a trading system encourages long-term investment in productive capacities. With appropriate supporting policies, infrastructure and an educated work force, trade can also help to promote productive employment and decent work, women's empowerment and food security, as well as a reduction in inequality, and contribute to achieving the sustainable development goals.

80. We recognize that the multilateral trade negotiations in WTO require more effort, although we regard the approval of the Bali package in 2013 as an important achievement. We reaffirm our commitment to strengthening the multilateral system. We call upon members of WTO to fully and expeditiously implement all the decisions of the Bali package,

<sup>22</sup> Ibid., vol. 2302, No. 41032.

including the decisions taken in favour of least developed countries, the decision on public stockholding for food security purposes and the work programme on small economies, and to expeditiously ratify the Agreement on Trade Facilitation. WTO members declaring themselves in a position to do so should notify commercially meaningful preferences for least developed country services and service suppliers in accordance with the 2011 and 2013 Bali decision on the operationalization of the least developed countries services waiver and in response to the collective request of those countries.

81. We acknowledge that lack of access to trade finance can limit a country's trading potential and result in missed opportunities to use trade as an engine for development. We welcome the work carried out by the WTO Expert Group on Trade Financing, and commit to exploring ways to use market-oriented incentives to expand WTO-compatible trade finance and the availability of trade credit, guarantees, insurance, factoring, letters of credit and innovative financial instruments, including for micro, small and medium-sized enterprises in developing countries. We call upon the development banks to provide and increase market-oriented trade finance and to examine ways to address market failures associated with trade finance.

82. Whereas, since Monterrey, exports of many developing countries have increased significantly, the participation of least developed countries, landlocked developing countries, small island developing States and Africa in world trade in goods and services remains low and world trade seems challenged to return to the buoyant growth rates seen before the global financial crisis. We will endeavour to significantly increase world trade in a manner consistent with the sustainable development goals, including exports from developing countries, in particular from least developed countries with a view towards doubling their share of global exports by 2020 as stated in the Istanbul Programme of Action. We will integrate sustainable development into trade policy at all levels. Given the unique and particular vulnerabilities in small island developing States, we strongly support their engagement in trade and economic agreements. We will also support the fuller integration of small, vulnerable economies in regional and world markets.

83. As a means of fostering growth in global trade, we call upon WTO members to redouble their efforts to promptly conclude the negotiations on the Doha Development Agenda,<sup>23</sup> and reiterate that development concerns form an integral part of the Doha Development Agenda, which places the needs and interests of developing countries, including least developed countries, at the heart of the Doha Work Programme.<sup>23</sup> In that context, enhanced market access, balanced rules and well targeted, sustainably financed technical assistance and capacity-building programmes have important roles to play. We commit to combating protectionism in all its forms. In accordance with one element of the mandate of the Doha Development Agenda, we call upon WTO members to correct and prevent trade restrictions and distortions in world agricultural markets, including through the parallel elimination of all forms of agricultural export subsidies and disciplines on all export measures with equivalent effect. We call upon WTO members to also commit to strengthening disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of subsidies that contribute to overcapacity and overfishing in accordance with the mandate of the Doha Development Agenda and the Hong Kong Ministerial Declaration. We urge WTO members to commit to continuing efforts to accelerate the accession of all developing countries engaged in negotiations for WTO membership and welcome the 2012 strengthening, streamlining and operationalizing of the guidelines for the accession of least developed countries to WTO.

84. Members of WTO will continue to implement the provisions of special and differential treatment for developing countries, in particular least developed countries, in accordance with WTO agreements. We welcome the establishment of the monitoring mechanism to analyse and review all aspects of the implementation of special and differential treatment provisions, as agreed in Bali, with a view to strengthening them and making them more precise, effective and operational as well as facilitating integration of developing and least-developed WTO members into the multilateral trading system.

85. We call upon developed country WTO members and developing country WTO members declaring themselves in a position to do so to realize timely implementation of

<sup>23</sup> See A/C.2/56/7, annex.

duty-free and quota-free market access on a lasting basis for all products originating from all least developed countries, consistent with WTO decisions. We call upon them to also take steps to facilitate market access for products of least developed countries, including by developing simple and transparent rules of origin applicable to imports from least developed countries, in accordance with the guidelines adopted by WTO members at the Bali ministerial conference in 2013.

86. We reaffirm the right of WTO members to take advantage of the flexibilities in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and reaffirm that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. To this end, we would urge all WTO members that have not yet accepted the amendment of the TRIPS Agreement allowing improved access to affordable medicines for developing countries to do so by the deadline of the end of 2015. We welcome the June 2013 decision to extend the transition period for all least developed countries. We invite the General Council to consider how WTO can contribute to sustainable development.

87. We recognize the significant potential of regional economic integration and interconnectivity to promote inclusive growth and sustainable development, and commit to strengthening regional cooperation and regional trade agreements. We will strengthen coherence and consistency among bilateral and regional trade and investment agreements, and to ensure that they are compatible with WTO rules. Regional integration can also be an important catalyst to reduce trade barriers, implement policy reforms and enable companies, including micro, small and medium-sized enterprises, to integrate into regional and global value chains. We underline the contribution trade facilitation measures can make to this end. We urge the international community, including international financial institutions and multilateral and regional development banks, to increase its support to projects and cooperation frameworks that foster regional and subregional integration, with special attention to Africa, and that enhance the participation and integration of small-scale industrial and other enterprises, particularly from developing countries, into global value chains and markets. We encourage multilateral development banks, including regional banks, in collaboration with other stakeholders, to address gaps in trade, transport and transit-related regional infrastructure, including completing missing links connecting landlocked developing countries, least developed countries and small island developing States within regional networks.

88. Recognizing that international trade and investment offers opportunities but also requires complementary actions at the national level, we will strengthen domestic enabling environments and implement sound domestic policies and reforms conducive to realizing the potential of trade for inclusive growth and sustainable development. We further recognize the need for value addition by developing countries and for further integration of micro, small and medium-sized enterprises into value chains. We reiterate and will strengthen the important role of the United Nations Conference on Trade and Development (UNCTAD) as the focal point within the United Nations system for the integrated treatment of trade and development and interrelated issues in the areas of finance, technology, investment and sustainable development.

89. We endorse the efforts and initiatives of the United Nations Commission on International Trade Law, as the core legal body within the United Nations system in the field of international trade law, aimed at increasing coordination of and cooperation on legal activities of international and regional organizations active in the field of international trade law and at promoting the rule of law at the national and international levels in this field.

90. Aid for trade can play a major role. We will focus aid for trade on developing countries, in particular least developed countries, including through the Enhanced Integrated Framework for Trade-related Technical Assistance to Least Developed Countries. We will strive to allocate an increasing proportion of aid for trade going to least developed countries, provided according to development cooperation effectiveness principles. We also welcome additional cooperation among developing countries to this end. Recognizing the critical role of women as producers and traders, we will address their specific challenges in order to facilitate women's equal and active participation in domestic, regional and international trade. Technical assistance and improvement of trade- and transit-related logistics are crucial in enabling landlocked developing countries to fully participate in and benefit from

multilateral trade negotiations, effectively implement policies and regulations aimed at facilitating transport and trade and diversify their export base.

91. The goal of protecting and encouraging investment should not affect our ability to pursue public policy objectives. We will endeavour to craft trade and investment agreements with appropriate safeguards so as not to constrain domestic policies and regulation in the public interest. We will implement such agreements in a transparent manner. We commit to supporting capacity-building including through bilateral and multilateral channels, in particular to least developed countries, in order to benefit from opportunities in international trade and investment agreements. We request UNCTAD to continue its existing programme of meetings and consultations with Member States on investment agreements.

92. We also recognize that illegal wildlife trade, illegal, unreported and unregulated fishing, illegal logging and illegal mining are a challenge for many countries. Such activities can create substantial damage, including lost revenue and corruption. We resolve to enhance global support for efforts to combat poaching of and trafficking in protected species, trafficking in hazardous waste and trafficking in minerals, including by strengthening both national regulation and international cooperation and increasing the capacity of local communities to pursue sustainable livelihood opportunities. We will also enhance capacity for monitoring, control and surveillance of fishing vessels so as to effectively prevent, deter and eliminate illegal, unreported and unregulated fishing, including through institutional capacity-building.

#### **E. Debt and debt sustainability**

93. Borrowing is an important tool for financing investment critical to achieving sustainable development, including the sustainable development goals. Sovereign borrowing also allows government finance to play a countercyclical role over economic cycles. However, borrowing needs to be managed prudently. Since the Monterrey Consensus, strengthened macroeconomic and public resource management has led to a substantial decline in the vulnerability of many countries to sovereign debt distress, as has the substantial debt reduction through the Heavily Indebted Poor Countries Initiative (HIPC) and Multilateral Debt Relief Initiative. Yet many countries remain vulnerable to debt crises and some are in the midst of crises, including a number of least developed countries, small island developing States and some developed countries. We acknowledge that debt sustainability challenges facing many least developed countries and small island developing States require urgent solutions, and the importance of ensuring debt sustainability to the smooth transition of countries that have graduated from least developed country status.

94. We recognize the need to assist developing countries in attaining long-term debt sustainability through coordinated policies aimed at fostering debt financing, debt relief, debt restructuring and sound debt management, as appropriate. We will continue to support the remaining HIPC-eligible countries that are working to complete the HIPC process. On a case-by-case basis, we could explore initiatives to support non-HIPC countries with sound economic policies to enable them to address the issue of debt sustainability. We will support the maintenance of debt sustainability in those countries that have received debt relief and achieved sustainable debt levels.

95. The monitoring and prudent management of liabilities is an important element of comprehensive national financing strategies and is critical to reducing vulnerabilities. We welcome the efforts of IMF, the World Bank and the United Nations system to further strengthen the analytical tools for assessing debt sustainability and prudent public debt management. In this regard, the IMF-World Bank debt sustainability analysis is a useful tool to inform the level of appropriate borrowing. We invite IMF and the World Bank to continue strengthening their analytical tools for sovereign debt management in an open and inclusive process with the United Nations and other stakeholders. We encourage international institutions to continue to provide assistance to debtor countries to enhance debt management capacity, manage risks and analyse trade-offs between different sources of financing, as well as to help to cushion against external shocks and ensure steady and stable access to public financing.

96. We welcome the continuing activities in setting methodological standards and promoting public availability of data on public and publicly guaranteed sovereign debt and



on the total external debt obligations of economies, and more comprehensive quarterly publication of debt data. We invite relevant institutions to consider the creation of a central data registry including information on debt restructurings. We encourage all Governments to improve transparency in debt management.

97. We reiterate that debtors and creditors must work together to prevent and resolve unsustainable debt situations. Maintaining sustainable debt levels is the responsibility of the borrowing countries; however we acknowledge that lenders also have a responsibility to lend in a way that does not undermine a country's debt sustainability. In this regard, we take note of the UNCTAD principles on responsible sovereign lending and borrowing. We recognize the applicable requirements of the IMF debt limits policy and/or the World Bank's non-concessional borrowing policy. The OECD Development Assistance Committee has introduced new safeguards in its statistical system in order to enhance the debt sustainability of recipient countries. We recall the need to strengthen information-sharing and transparency to make sure that debt sustainability assessments are based on comprehensive, objective and reliable data. We will work towards a global consensus on guidelines for debtor and creditor responsibilities in borrowing by and lending to sovereigns, building on existing initiatives.

98. We affirm the importance of debt restructurings being timely, orderly, effective, fair and negotiated in good faith. We believe that a workout from a sovereign debt crisis should aim to restore public debt sustainability, while preserving access to financing resources under favourable conditions. We further acknowledge that successful debt restructurings enhance the ability of countries to achieve sustainable development and the sustainable development goals. We continue to be concerned with non-cooperative creditors who have demonstrated their ability to disrupt timely completion of the debt restructurings.

99. We recognize that important improvements have been made since Monterrey in enhancing the processes for cooperative restructuring of sovereign obligations, including in the Paris Club of official creditors and in the market acceptance of new standard clauses of government bond contracts. However, we acknowledge the existence of stocks of sovereign bonds without those collective action clauses. We recognize that there is scope to improve the arrangements for coordination between public and private sectors and between debtors and creditors, to minimize both creditor and debtor moral hazards and to facilitate fair burden-sharing and an orderly, timely and efficient restructuring that respects the principles of shared responsibility. We take note of the ongoing work being carried out by IMF and the United Nations system in this area. We recognize the recent "Paris Forum" initiative by the Paris Club that aims to foster dialogue among sovereign creditors and debtors on debt issues. We encourage efforts towards a durable solution to the debt problems of developing countries to promote their economic growth and sustainable development.

100. We are concerned by the ability of non-cooperative minority bondholders to disrupt the will of the large majority of bondholders who accept a restructuring of a debt-crisis country's obligations, given the potential broader implications in other countries. We note legislative steps taken by certain countries to prevent these activities and encourage all Governments to take action, as appropriate. Furthermore, we take note of discussions in the United Nations on debt issues. We welcome the reforms to *pari passu* and collective action clauses proposed by the International Capital Market Association, and endorsed by IMF, to reduce the vulnerability of sovereigns to holdout creditors. We encourage countries, particularly those issuing bonds under foreign law, to take further actions to include those clauses in all their bond issuance. We also welcome provision of financial support for legal assistance to least developed countries and commit to boosting international support for advisory legal services. We will explore enhanced international monitoring of litigation by creditors after debt restructuring.

101. We note the increased issuance of sovereign bonds in domestic currency under national laws and the possibility of countries voluntarily strengthening domestic legislation to reflect guiding principles for effective, timely, orderly and fair resolution of sovereign debt crises.

102. We recognize that severe natural disasters and social or economic shocks can undermine a country's debt sustainability, and note that public creditors have taken steps to ease debt repayment obligations through debt rescheduling and debt cancellation following an earthquake, a tsunami and in the context of the Ebola crisis in West Africa. We encourage

consideration of further debt relief steps, where appropriate, and/or other measures for countries affected in this regard, as feasible. We also encourage the study of new financial instruments for developing countries, particularly least developed countries, landlocked developing countries and small island developing States experiencing debt distress, noting experiences of debt-to-health and debt-to-nature swaps.

#### **F. Addressing systemic issues**

103. Monterrey emphasized the importance of continuing to improve global economic governance and to strengthen the United Nations leadership role in promoting development. Monterrey also emphasized the importance of the coherence and consistency of the international financial and monetary and trading systems in support of development. Since Monterrey, we have become increasingly aware of the need to take account of economic, social and environmental challenges, including the loss of biodiversity, natural disasters and climate change, and to enhance policy coherence across all three dimensions of sustainable development. We will take measures to improve and enhance global economic governance and to arrive at a stronger, more coherent and more inclusive and representative international architecture for sustainable development, while respecting the mandates of respective organizations. We recognize the importance of policy coherence for sustainable development and we call upon countries to assess the impact of their policies on sustainable development.

104. The 2008 world financial and economic crisis underscored the need for sound regulation of financial markets to strengthen financial and economic stability, as well as the imperative of a global financial safety net. We welcome the important steps taken since Monterrey, particularly following the crisis in 2008, to build resilience, reduce vulnerability to international financial disruption and reduce spillover effects of global financial crises, including to developing countries, in a reform agenda whose completion remains a high priority. The IMF membership bolstered the Fund's lending capacity and multilateral and national development banks played important countercyclical roles during the crisis. The world's principal financial centres worked together to reduce systemic risks and financial volatility through stronger national financial regulation, including Basel III and the broader financial reform agenda.

105. Regulatory gaps and misaligned incentives continue to pose risks to financial stability, including risks of spillover effects of financial crises to developing countries, which suggests a need to pursue further reforms of the international financial and monetary system. We will continue to strengthen international coordination and policy coherence to enhance global financial and macroeconomic stability. We will work to prevent and reduce the risk and impact of financial crises, acknowledging that national policy decisions can have systemic and far-ranging effects well beyond national borders, including on developing countries. We commit to pursuing sound macroeconomic policies that contribute to global stability, equitable and sustainable growth and sustainable development, while strengthening our financial systems and economic institutions. When dealing with risks from large and volatile capital flows, necessary macroeconomic policy adjustment could be supported by macroprudential and, as appropriate, capital flow management measures.

106. We recommit to broadening and strengthening the voice and participation of developing countries in international economic decision-making and norm-setting and global economic governance. We recognize the importance of overcoming obstacles to planned resource increases and governance reforms at IMF. The implementation of the 2010 reforms for IMF remains the highest priority and we strongly urge the earliest ratification of those reforms. We reiterate our commitment to further governance reform in both IMF and the World Bank to adapt to changes in the global economy. We invite the Basel Committee on Banking Supervision and other main international regulatory standard-setting bodies to continue efforts to increase the voice of developing countries in norm-setting processes to ensure that their concerns are taken into consideration. As the shareholders in the main international financial institutions, we commit to open and transparent, gender-balanced and merit-based selection of their heads, and to enhanced diversity of staff.

107. At the same time, we recognize the importance of strengthening the permanent international financial safety net. We remain committed to maintaining a strong and quota-based IMF, with adequate resources to fulfil its systemic responsibilities. We look

forward to the quinquennial special drawing rights review by IMF this year. We encourage dialogue among regional financial arrangements and strengthened cooperation between IMF and regional financial arrangements, while safeguarding the independence of the respective institutions. We call upon the relevant international financial institutions to further improve early warning of macroeconomic and financial risks. We also urge IMF to continue its efforts to provide more comprehensive and flexible financial responses to the needs of developing countries. We request the international financial institutions to continue to support developing countries in developing new instruments for financial risk management and capacity-building. Consistent with its mandate, we call upon IMF to provide adequate levels of financial support to developing countries pursuing sustainable development to assist them in managing any associated pressures on the national balance of payments. We stress the importance of ensuring that international agreements, rules and standards are consistent with each other and with progress towards the sustainable development goals. We encourage development finance institutions to align their business practices with the post-2015 development agenda.

108. We are concerned about excessive volatility of commodity prices, including for food and agriculture and its consequences for global food security and improved nutrition outcomes. We will adopt measures to ensure the proper functioning of food commodity markets and their derivatives and call for relevant regulatory bodies to adopt measures to facilitate timely, accurate and transparent access to market information in an effort to ensure that commodity markets appropriately reflect underlying demand and supply changes and to help to limit excess volatility of commodity prices. In this regard, we also take note of the Agricultural Market Information System hosted by FAO. We will also provide access for small-scale artisanal fishers to marine resources and markets, consistent with sustainable management practices as well as initiatives that add value to outputs from small-scale fishers.

109. We take note of the work by the Financial Stability Board on financial market reform, and commit to sustaining or strengthening our frameworks for macroprudential regulation and countercyclical buffers. We will hasten completion of the reform agenda on financial market regulation, including assessing and if necessary reducing the systemic risks associated with shadow banking, markets for derivatives, securities lending and repurchase agreements. We also commit to addressing the risk created by “too-big-to-fail” financial institutions and addressing cross-border elements in effective resolution of troubled systemically important financial institutions.

110. We resolve to reduce mechanistic reliance on credit-rating agency assessments, including in regulations. To improve the quality of ratings, we will promote increased competition as well as measures to avoid conflict of interest in the provision of credit ratings. We acknowledge the efforts of the Financial Stability Board and others in this area. We support building greater transparency requirements for evaluation standards of credit-rating agencies. We will continue ongoing work on these issues, including in the United Nations.

111. We recognize that international migration is a multidimensional reality of major relevance for the development of origin, transit and destination countries that must be addressed in a coherent, comprehensive and balanced manner. We will cooperate internationally to ensure safe, orderly and regular migration, with full respect for human rights. We endeavour to increase cooperation on access to and portability of earned benefits, enhance the recognition of foreign qualifications, education and skills, lower the costs of recruitment for migrants and combat unscrupulous recruiters, in accordance with national circumstances and legislation. We further endeavour to implement effective social communication strategies on the contribution of migrants to sustainable development in all its dimensions, in particular in countries of destination, in order to combat xenophobia, facilitate social integration and protect migrants’ human rights through national frameworks. We reaffirm the need to promote and protect effectively the human rights and fundamental freedoms of all migrants, especially those of women and children, regardless of their migration status.

112. We will strengthen regional, national and subnational institutions to prevent all forms of violence, combat terrorism and crime and end human trafficking and exploitation of persons, in particular women and children, in accordance with international human rights law. We will effectively strengthen national institutions to combat money-laundering, corruption and the financing of terrorism, which have serious implications for economic

development and social cohesion. We will enhance international cooperation for capacity-building in these areas at all levels, in particular in developing countries. We commit to ensuring the effective implementation of the United Nations Convention against Transnational Organized Crime.<sup>24</sup>

113. Building on the vision of the Monterrey Consensus, we resolve to strengthen the coherence and consistency of multilateral financial, investment, trade and development policy and environment institutions and platforms and increase cooperation between major international institutions, while respecting mandates and governance structures. We commit to taking better advantage of relevant United Nations forums for promoting universal and holistic coherence and international commitments to sustainable development.

#### **G. Science, technology, innovation and capacity-building**

114. The creation, development and diffusion of new innovations and technologies and associated know-how, including the transfer of technology on mutually agreed terms, are powerful drivers of economic growth and sustainable development. However, we note with concern the persistent “digital divide” and the uneven innovative capacity, connectivity and access to technology, including information and communications technology, within and between countries. We will promote the development and use of information and communications technology infrastructure, as well as capacity-building, particularly in least developed countries, landlocked developing countries and small island developing States, including rapid universal and affordable access to the Internet. We will promote access to technology and science for women, youth and children. We will further facilitate accessible technology for persons with disabilities.

115. Capacity development will be integral to achieving the post-2015 development agenda. We call for enhanced international support and establishment of multi-stakeholder partnerships for implementing effective and targeted capacity-building in developing countries, including least developed countries, landlocked developing countries, small island developing States, African countries and countries in conflict and post-conflict situations, to support national plans to implement all the sustainable development goals. Capacity development must be country-driven, address the specific needs and conditions of countries and reflect national sustainable development strategies and priorities. We reiterate the importance of strengthening institutional capacity and human resource development. It is also critical to reinforce national efforts in capacity-building in developing countries in such areas as public finance and administration, social and gender responsive budgeting, mortgage finance, financial regulation and supervision, agriculture productivity, fisheries, debt management, climate services, including planning and management for both adaptation and mitigation purposes, and water and sanitation-related activities and programmes.

116. We will craft policies that incentivize the creation of new technologies, that incentivize research and that support innovation in developing countries. We recognize the importance of an enabling environment at all levels, including enabling regulatory and governance frameworks, in nurturing science, innovation, the dissemination of technologies, particularly to micro, small and medium-sized enterprises, as well as industrial diversification and value added to commodities. We also recognize the importance of adequate, balanced and effective protection of intellectual property rights in both developed and developing countries in line with nationally defined priorities and in full respect of WTO rules. We recognize voluntary patent pooling and other business models, which can enhance access to technology and foster innovation. We will promote social innovation to support social well-being and sustainable livelihoods.

117. We will encourage knowledge-sharing and the promotion of cooperation and partnerships between stakeholders, including between Governments, firms, academia and civil society, in sectors contributing to the achievement of the sustainable development goals. We will promote entrepreneurship, including through supporting business incubators. We affirm that regulatory environments that are open and non-discriminatory can promote collaboration and further our efforts. We will also foster linkages between multinational companies and the domestic private sector to facilitate technology development and transfer, on mutually agreed terms, of knowledge and skills, including skills trading programmes, in

<sup>24</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

particular to developing countries, with the support of appropriate policies. At the same time, we recognize that traditional knowledge, innovations and practices of indigenous peoples and local communities can support social well-being and sustainable livelihoods and we reaffirm that indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions.

118. We also recognize the important role of public finance and policies in research and technological development. We will consider using public funding to enable critical projects to remain in the public domain and strive for open access to research for publicly funded projects, as appropriate. We will consider setting up innovation funds where appropriate, on an open, competitive basis to support innovative enterprises, particularly during research, development and demonstration phases. We recognize the value of a “portfolio approach” in which public and private venture funds invest in diverse sets of projects to diversify risks and capture the upside of successful enterprises.

119. We resolve to adopt science, technology and innovation strategies as integral elements of our national sustainable development strategies to help to strengthen knowledge-sharing and collaboration. We will scale up investment in science, technology, engineering and mathematics education and enhance technical, vocational and tertiary education and training, ensuring equal access for women and girls and encouraging their participation therein. We will increase the number of scholarships available to students in developing countries to enrol in higher education. We will enhance cooperation to strengthen tertiary education systems and aim to increase access to online education in areas related to sustainable development.

120. We will encourage the development, dissemination and diffusion and transfer of environmentally sound technologies to developing countries on favourable terms, including on concessional and preferential terms, as mutually agreed. We will endeavour to step up international cooperation and collaboration in science, research, technology and innovation, including through public-private and multi-stakeholder partnerships, and on the basis of common interest and mutual benefit, focusing on the needs of developing countries and the achievement of the sustainable development goals. We will continue to support developing countries to strengthen their scientific, technological and innovative capacity to move towards more sustainable patterns of consumption and production, including through implementation of the 10-year framework of programmes on sustainable consumption and production patterns. We will enhance international cooperation, including ODA, in these areas, in particular to least developed countries, landlocked developing countries, small island developing States and countries in Africa. We also encourage other forms of international cooperation, including South-South cooperation, to complement these efforts.

121. We will support research and development of vaccines and medicines, as well as preventive measures and treatments for the communicable and non-communicable diseases, in particular those that disproportionately impact developing countries. We will support relevant initiatives, such as Gavi, the Vaccine Alliance, which incentivizes innovation while expanding access in developing countries. To reach food security, we commit to further investment, including through enhanced international cooperation, in earth observation, rural infrastructure, agricultural research and extension services and technology development by enhancing agricultural productive capacity in developing countries, in particular in least developed countries, for example by developing plant and livestock gene banks. We will increase scientific knowledge, develop research capacity and transfer marine technology, taking into account the Criteria and Guidelines on the Transfer of Marine Technology adopted by the Intergovernmental Oceanographic Commission, in order to improve ocean health and to enhance the contribution of marine biodiversity to the development of developing countries, in particular small island developing States and least developed countries.

122. We welcome science, technology and capacity-building initiatives, including the Commission on Science and Technology for Development, the Technology Mechanism under the United Nations Framework Convention on Climate Change, the advisory services of the Climate Technology Centre and Network, the capacity-building of the World Intellectual Property Organization (WIPO) and the UNIDO National Cleaner Production Centres networks. We invite specialized agencies, funds and programmes of the United Nations system with technology-intensive mandates to further promote the development and

diffusion of relevant science, technologies and capacity-building through their respective work programmes. We commit to strengthening coherence and synergies among science and technology initiatives within the United Nations system, with a view to eliminating duplicative efforts and recognizing the many successful existing efforts in this space.

123. We decide to establish a Technology Facilitation Mechanism. The Mechanism will be launched at the United Nations summit for the adoption of the post-2015 development agenda in order to support the sustainable development goals.

- We decide that the Technology Facilitation Mechanism will be based on a multi-stakeholder collaboration between Member States, civil society, the private sector, the scientific community, United Nations entities and other stakeholders and will be composed of a United Nations inter-agency task team on science, technology and innovation for the sustainable development goals, a collaborative multi-stakeholder forum on science, technology and innovation for the sustainable development goals and an online platform.
- The United Nations inter-agency task team on science, technology and innovation for the sustainable development goals will promote coordination, coherence and cooperation within the United Nations system on science, technology and innovation related matters, enhancing synergy and efficiency, in particular to enhance capacity-building initiatives. The task team will draw on existing resources and will work with 10 representatives from civil society, the private sector and the scientific community to prepare the meetings of the multi-stakeholder forum on science, technology and innovation for the sustainable development goals, as well as in the development and operationalization of the online platform, including preparing proposals for the modalities for the forum and the online platform. The 10 representatives will be appointed by the Secretary-General, for periods of two years. The task team will be open to the participation of all United Nations agencies, funds and programmes and the functional commissions of the Economic and Social Council and it will initially be composed of the entities that currently integrate the informal working group on technology facilitation, namely, the Department of Economic and Social Affairs of the Secretariat, the United Nations Environment Programme, UNIDO, the United Nations Educational, Scientific and Cultural Organization, UNCTAD, the International Telecommunication Union, WIPO and the World Bank.
- The online platform will be used to establish a comprehensive mapping of, and serve as a gateway for, information on existing science, technology and innovation initiatives, mechanisms and programmes, within and beyond the United Nations. The online platform will facilitate access to information, knowledge and experience, as well as best practices and lessons learned, on science, technology and innovation facilitation initiatives and policies. The online platform will also facilitate the dissemination of relevant open access scientific publications generated worldwide. The online platform will be developed on the basis of an independent technical assessment which will take into account best practices and lessons learned from other initiatives, within and beyond the United Nations, in order to ensure that it will complement, facilitate access to and provide adequate information on existing science, technology and innovation platforms, avoiding duplications and enhancing synergies.
- The multi-stakeholder forum on science, technology and innovation for the sustainable development goals will be convened once a year, for a period of two days, to discuss science, technology and innovation cooperation around thematic areas for the implementation of the sustainable development goals, congregating all relevant stakeholders to actively contribute in their area of expertise. The forum will provide a venue for facilitating interaction, matchmaking and the establishment of networks between relevant stakeholders and multi-stakeholder partnerships in order to identify and examine technology needs and gaps, including on scientific cooperation, innovation and capacity-building, and also in order to help to facilitate development, transfer and dissemination of relevant technologies for the sustainable development goals. The meetings of the forum will be convened by the President of the Economic and Social Council before the meetings of the high-level political forum on sustainable development, under the auspices of the Council or, alternatively, in conjunction with other forums or conferences, as appropriate, taking into account the theme to be

considered and on the basis of a collaboration with the organizers of the other forums or conferences. The meetings of the forum will be co-chaired by two Member States and will result in a summary of discussions elaborated by the two co-Chairs, as an input to the meetings of the high-level political forum, in the context of the follow-up and review of the implementation of the post-2015 development agenda.

- The meetings of the high-level political forum will be informed by the summary of the multi-stakeholder forum. The themes for the subsequent multi-stakeholder forum on science, technology and innovation for the sustainable development goals will be considered by the high-level political forum on sustainable development, taking into account expert inputs from the task team.

124. We look forward to the recommendations of the Secretary-General's High-level Panel on the Technology Bank for Least Developed Countries on the feasibility and organizational and operational functions of a proposed technology bank and science, technology and innovation capacity-building mechanism for least developed countries. We will take into account the High-level Panel's recommendations on the scope, functions, institutional linkages and organizational aspects of the proposed bank, with a view to operationalizing it by 2017, and will seek to promote synergies with the Technology Facilitation Mechanism.

### **III. Data, monitoring and follow-up**

125. High-quality disaggregated data is an essential input for smart and transparent decision-making, including in support of the post-2015 agenda and its means of implementation, and can improve policy-making at all levels. A focus on quantitative and qualitative data, including open data, and statistical systems and administrations at the national and subnational level will be especially important in order to strengthen domestic capacity, transparency and accountability in the global partnership. National statistical systems have a central role in generating, disseminating and administering data. They should be supplemented with data and analysis from civil society, academia and the private sector.

126. We will seek to increase and use high-quality, timely and reliable data disaggregated by sex, age, geography, income, race, ethnicity, migratory status, disability and other characteristics relevant in national contexts. We will enhance capacity-building support to developing countries, including for least developed countries, landlocked developing countries and small island developing States, for this purpose and provide international cooperation, including through technical and financial support, to further strengthen the capacity of national statistical authorities and bureaux. We call upon relevant institutions to strengthen and standardize data on domestic and international resource mobilization and spending, as well as data on other means of implementation. In this regard, we will welcome proposals on improved statistical indicators for all means of implementation. We also request the Statistical Commission, working with the relevant international statistical services and forums, to facilitate enhanced tracking of data on all cross-border financing and other economically relevant financial flows that brings together existing databases and to regularly assess and report on the adequacy of international statistics related to implementing the sustainable development agenda. The availability of timely and reliable data for development could be improved by supporting civil registration and vital statistics systems, which generate information for national plans and investment opportunities.

127. We recognize that greater transparency is essential and can be provided by publishing timely, comprehensive and forward-looking information on development activities in a common, open, electronic format, as appropriate. Access to reliable data and statistics helps Governments to make informed decisions, and enables all stakeholders to track progress and understand trade-offs, and creates mutual accountability. We will learn from existing transparency initiatives and open data standards, and take note of the International Aid Transparency Initiative. We further recognize the importance of national ownership of the post-2015 development agenda, and stress the importance of preparing country needs assessments for the different priority areas to allow for greater transparency and efficiency by linking needs and support, in particular in developing countries.

128. Data access alone, however, is not enough to fully realize the potential that data can offer to both achieving, monitoring and reviewing sustainable development goals. We should endeavour to ensure broad access to the tools necessary to turn data into useful,

actionable information. We will support efforts to make data standards interoperable, allowing data from different sources to be more easily compared and used. We call upon relevant public and private actors to put forward proposals to achieve a significant increase in global data literacy, accessibility and use, in support of the post-2015 development agenda.

129. We further call upon the United Nations system, in consultation with the international financial institutions, to develop transparent measurements of progress on sustainable development that go beyond per capita income, building on existing initiatives as appropriate. These should recognize poverty in all of its forms and dimensions and the social, economic and environmental dimensions of domestic output and structural gaps at all levels. We will seek to develop and implement tools to mainstream sustainable development, as well as to monitor sustainable development impacts for different economic activities, including for sustainable tourism.

130. Mechanisms for follow-up and review will be essential to the achievement of the sustainable development goals and their means of implementation. We commit to fully engaging, nationally, regionally and internationally, in ensuring proper and effective follow-up of the financing for development outcomes and all the means of implementation of the post-2015 development agenda. To achieve this, it will be necessary to ensure the participation of relevant ministries, local authorities, national parliaments, central banks and financial regulators, as well as the major institutional stakeholders, other international development banks and other relevant institutions, civil society, academia and the private sector. We encourage the United Nations regional commissions, in cooperation with regional banks and organizations, to mobilize their expertise and existing mechanisms, which could focus on thematic aspects of the present Action Agenda.

131. We appreciate the role played by the United Nations financing for development follow-up process. We recognize the interlinkages between the financing for development process and the means of implementation of the post-2015 development agenda, and emphasize the need of a dedicated follow-up and review for the financing for development outcomes as well as all the means of implementation of the post-2015 development agenda, which is integrated with the post-2015 follow-up and review process to be decided at the United Nations summit for the adoption of the post-2015 development agenda. The follow-up process should assess progress, identify obstacles and challenges to the implementation of the financing for development outcomes, and the delivery of the means of implementation, promote the sharing of lessons learned from experiences at the national and regional levels, address new and emerging topics of relevance to the implementation of this agenda as the need arises and provide policy recommendations for action by the international community. We will also enhance coordination, promote the efficiency of United Nations processes and avoid duplication and overlapping of discussions.

132. We commit to staying engaged to this important agenda through a dedicated and strengthened follow-up process that will use existing institutional arrangements and will include an annual Economic and Social Council forum on financing for development follow-up with universal, intergovernmental participation, to be launched during the Council's current cycle. The forum's modalities of participation will be those utilized at the international conferences on financing for development. The forum will consist of up to five days, one of which will be the special high-level meeting with the Bretton Woods institutions, WTO and UNCTAD, as well as additional institutional and other stakeholders depending on the priorities and scope of the meeting; up to four days will be dedicated to discussing the follow-up and review of the financing for development outcomes and the means of implementation of the post-2015 development agenda. Its intergovernmentally agreed conclusions and recommendations will be fed into the overall follow-up and review of the implementation of the post-2015 development agenda in the high-level political forum on sustainable development. The deliberations of the Development Cooperation Forum, according to its mandate, will also be taken into account. The High-level Dialogue on Financing for Development of the General Assembly will be held back-to-back with the high-level political forum under the auspices of the Assembly when the high-level political forum is convened every four years.

133. To ensure a strengthened follow-up process at the global level, we encourage the Secretary-General to convene an inter-agency task force, including the major institutional stakeholders and the United Nations system, including funds and programmes and



specialized agencies whose mandates are related to the follow-up, building on the experience of the Millennium Development Goals Gap Task Force. The inter-agency task force will report annually on progress in implementing the financing for development outcomes and the means of implementation of the post-2015 development agenda and advise the intergovernmental follow-up thereto on progress, implementation gaps and recommendations for corrective action, while taking into consideration the national and regional dimensions.

134. We will consider the need to hold a follow-up conference by 2019.



*Part Two*

**STUDIES AND REPORTS ON  
SPECIFIC SUBJECTS**



# I. ARBITRATION AND CONCILIATION

## A. Report of Working Group on Arbitration and Conciliation on the work of its fifty-ninth session (Vienna, 16-20 September 2013)

(A/CN.9/794)

[Original: English]

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## I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), with respect to future work in the field of settlement of commercial disputes, the Commission recalled the decision made at its forty-first session (New York, 16 June-3 July 2008)<sup>1</sup> that the topic of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority immediately after completion of the revision of the UNCITRAL Arbitration Rules. The Commission entrusted its Working Group II with the task of preparing a legal standard on that topic.<sup>2</sup>

<sup>1</sup> *Official records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 314.

<sup>2</sup> *Ibid.*, *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 190.

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reiterated its commitment expressed at its forty-first session regarding the importance of ensuring transparency in treaty-based investor-State arbitration. The Commission confirmed that the question of applicability of the legal standard on transparency to existing investment treaties was part of the mandate of the Working Group and a question with a great practical interest, taking account of the high number of treaties already concluded.<sup>3</sup>

3. At its forty-sixth session (Vienna, 8-26 July 2013), the Commission adopted<sup>4</sup> the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration<sup>5</sup> (the “Rules on Transparency”, or the “Rules”) and the UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013).<sup>6</sup> The decision of the Commission adopting the Rules on Transparency included the recommendation that, “subject to any provision in the relevant investment treaties that may require a higher degree of transparency, the Rules on Transparency be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to investment treaties concluded before the date of coming into effect of the Rules on Transparency, to the extent such application is consistent with those investment treaties.”<sup>7</sup> At that session, the Commission agreed by consensus to entrust the Working Group with the task of preparing a convention (the “transparency convention”) on the application of the Rules on Transparency to existing investment treaties, taking into account that the aim of the transparency convention was to give those States that wished to make the Rules on Transparency applicable to their existing investment treaties an efficient mechanism to do so, without creating any expectation that other States would use the mechanism offered by the transparency convention.<sup>8</sup>

4. The most recent compilation of historical references regarding the consideration by the Commission of works of the Working Group can be found in document A/CN.9/WG.II/WP.178, paragraphs 5 to 8.

## II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its fifty-ninth session in Vienna, from 16-20 September 2013. The session was attended by the following States members of the Working Group: Argentina, Armenia, Australia, Austria, Belarus, Brazil, Bulgaria, Canada, China, Colombia, Croatia, Denmark, Ecuador, El Salvador, France, Georgia, Germany, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Jordan, Kenya, Kuwait, Mauritius, Mexico, Nigeria, Pakistan, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, Ukraine, United States of America and Venezuela (Bolivarian Republic of).

6. The session was attended by observers from the following States: Angola, Bolivia (Plurinational State of), Chile, Cyprus, Czech Republic, Democratic Republic of the Congo, Dominican Republic, Finland, Lithuania, Netherlands, Norway, Peru, Poland, Qatar, Romania, Slovakia, Sweden and Vietnam.

7. The session was also attended by observers from the European Union.

8. The session was also attended by observers from the following international organizations:

(a) *Intergovernmental organizations*: European Centre for Peace and Development (ECPD), Organisation for Economic Cooperation and Development (OECD), Permanent Court of Arbitration (PCA);

(b) *Invited non-governmental organizations*: American Bar Association (ABA), Arab Association for International Arbitration (AAIA), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Association Suisse de l'Arbitrage (ASA), Barreau de Paris, Belgian Center for Arbitration and Mediation (CEPANI), Center for

<sup>3</sup> Ibid., *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 200.

<sup>4</sup> Ibid., *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 128.

<sup>5</sup> Ibid., *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, Annex I.

<sup>6</sup> Ibid., *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, Annex II.

<sup>7</sup> Ibid., para. 116.

<sup>8</sup> Ibid., para. 127.

International Environmental Law (CIEL), China International Economic and Trade Arbitration Commission (CIETAC), Construction Industry Arbitration Council (CIAC), Council of Bars and Law Societies of Europe (CCBE), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), Inter-Parliamentary Assembly of the Eurasian Economic Community (IPA EURASEC), International Bar Association (IBA), International Council for Commercial Arbitration (ICCA), International Insolvency Institute (IIL), International Institute for Sustainable Development (IISD), Korean Commercial Arbitration Board (KCAB), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), Milan Club of Arbitrators, Moot Alumni Association (MAA), New York State Bar Association (NYSBA), P.R.I.M.E. Finance Foundation (PRIME FINANCE), Tehran Regional Arbitration Centre (TRAC), Vienna International Arbitral Centre (VIAC).

9. The Working Group elected the following officers:

*Chairman:* Mr. Salim Moollan (Mauritius)

*Rapporteur:* Mr. Shotaro Hamamoto (Japan)

10. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.178); (b) notes by the Secretariat regarding the preparation of a convention on transparency in treaty-based investor-State arbitration (A/CN.9/784 and A/CN.9/WG.II/WP.179).

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of a convention on transparency in treaty-based investor-State arbitration.
5. Organization of future work.
6. Other business.
7. Adoption of the report.

### III. Deliberations and decisions

12. The Working Group resumed its work on agenda item 4 on the basis of the notes prepared by the Secretariat (A/CN.9/784 and A/CN.9/WG.II/WP.179). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. The Secretariat was requested to prepare a revised draft of the transparency convention, based on the deliberations and decisions of the Working Group.

### IV. Preparation of a convention on transparency in treaty-based investor-State arbitration

13. The Working Group recalled the consensus recorded at the forty-sixth session of the Commission to entrust the Working Group with the task of preparing the transparency convention, taking into account that the aim of the transparency convention was to give those States that wished to make the Rules on Transparency applicable to their existing investment treaties an efficient mechanism to do so, without creating any expectation that other States would use the mechanism offered by the transparency convention (see above, para. 3).<sup>9</sup>

14. It was recalled that the draft text of the transparency convention as set out in paragraph 5 of document A/CN.9/784 was a proposal by the Secretariat which had not yet

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<sup>9</sup> Ibid.

been the subject of any discussion in the Working Group and that it provided a starting point for discussions in relation to achieving the mandate.<sup>10</sup>

15. The Working Group proceeded to address the issues in relation to, and the substance of, the transparency convention.

## **A. General matters**

16. The Working Group considered three general issues arising in relation to the transparency convention.

### **1. Relation between the transparency convention and existing investment treaties**

17. First, the Working Group considered in broad terms the effect of the transparency convention in relation to investment treaties, and specifically whether the transparency convention, upon coming into force, would constitute a successive treaty creating new obligations (pursuant to article 30 of the Vienna Convention on the Law of Treaties (1969) (the “Vienna Convention”)), or whether it would constitute an amendment or modification (pursuant to provisions of existing investment treaties and Chapter IV of the Vienna Convention) to such investment treaties (A/CN.9/WG.II/WP.179, paras. 5-7).

18. It was said that logically one could not refer to an amendment or modification to investment treaties in the context of a subsequent treaty creating new obligations between Contracting Parties, but rather, that the transparency convention would amount to a successive agreement between Contracting Parties. Significant support was expressed for that view.

19. A different view was expressed on an initial basis, namely that the transparency convention might be seen to constitute an amendment to relevant investment treaties.

20. The Working Group considered whether the outcome of the determination as to whether the transparency convention was a successive one, or an amending one, would affect the drafting of the transparency convention. A view was expressed, again on a preliminary basis, that in case of the latter, and concerning multilateral investment treaties, notification provisions (to other Parties to investment treaties to which the transparency convention would apply) might need to be included in the transparency convention, but that in the case of the former, no additional provisions were likely to be required.

21. The point was raised that in investment treaties that did contain extensive transparency provisions, complications might arise in relation to, for example, which transparency regime applied, but that those might be dealt with in the deliberations under article 3 of the transparency convention (see below, paras. 73 to 77, 80 and 102).

22. It was noted that, at that stage of deliberations, a great number of delegations were inclined to view the transparency convention as a successive treaty pursuant to article 30 of the Vienna Convention, but that delegations would consider the matter further.

### **2. Unilateral offer to arbitrate under the Rules on Transparency**

23. The Working Group took note that, under article 1, the transparency convention would apply when Parties to a relevant investment treaty were also Contracting Parties to the transparency convention (A/CN.9/784, para. 6).

24. As a second general issue, the Working Group considered whether a Contracting Party’s consent to be bound by the transparency convention (whether by ratification, acceptance, approval or accession) would amount to a unilateral offer to an investor initiating a claim under a relevant investment treaty, where that investor’s home State was not a party to the transparency convention, for that investor to accept the application of the Rules on Transparency.

25. The Working Group considered in that respect, first, whether such an outcome was within the mandate given by the Commission to the Working Group (see above, paras. 3 and 13), and second, if so, whether language indicating that such a unilateral offer was being

<sup>10</sup> Ibid., para. 124.



made by Contracting Parties to the transparency convention ought to be included in the transparency convention itself.

26. It was said in support of the view that the transparency convention should amount to a unilateral offer by a Contracting Party that such unilateralism was the basis on which most offers to initiate an investor-State claim were made, and that it would provide a broader application to the Rules on Transparency.

27. It was said in response that the application of the transparency convention should be based on reciprocity of consent between Parties to relevant investment treaties.

28. A proposal was made to include separate provisions in the transparency convention in relation to the application of the Rules on Transparency. The first would make the Rules on Transparency applicable when both the investor's home State and the respondent State were Contracting Parties to the transparency convention. The second would indicate that the transparency convention amounted to a unilateral offer by a Contracting Party as set out above in paragraph 24. It was said that that solution would clarify the scope of application of the transparency convention. It was also suggested that the transparency convention should provide for the possibility for the Contracting Parties to formulate a reservation under article 4 that would preclude the application of the second provision should they so wish.

29. The Working Group agreed to consider that matter further at a later stage of its deliberations (see below, paras. 104-114).

### **3. Application to arbitrations under the UNCITRAL Arbitration Rules or under all arbitration rules**

30. Third, the Working Group considered whether the transparency convention ought to apply only to UNCITRAL Arbitration Rules-based disputes, or whether it ought to apply to disputes under all arbitration rules provided as options to the investor in an investment treaty. It was clarified that consultations with arbitral institutions during the drafting of the Rules on Transparency had confirmed that the Rules on Transparency worked in conjunction with other institutional rules (see A/CN.9/WG.II/WP.173).

31. It was said that if the transparency convention were made applicable to all disputes arising under relevant investment treaties irrespective of the arbitration rules selected by the investor under those treaties, the proceedings would be transparent, but if it were only made applicable to arbitrations under UNCITRAL Arbitration Rules, the investor would have the opportunity to determine whether proceedings would be transparent or not.

32. After discussion, the Working Group stated that the transparency convention should apply regardless of the arbitration rules selected by an investor under a relevant investment treaty. It was suggested that a reservation could be considered under article 4 of the transparency convention in order that Contracting Parties could limit the application of the transparency convention to UNCITRAL Arbitration Rules-based disputes (see below, paras. 138-139).

## **B. Consideration of the draft text of the transparency convention**

### **1. Preamble**

33. The Working Group considered the draft preamble as set out in paragraph 5 of document A/CN.9/784.

#### *First two paragraphs*

34. A suggestion was made to delete the two first paragraphs of the preamble on the basis that they were unnecessary. If they were to be retained, it was suggested that they should include a reference to investment, instead of trade. In response, it was pointed out that these paragraphs were referring in general terms to the principles on which the mandate of UNCITRAL, as contained in the General Assembly resolution 2205 (XXI) of 17 December 1966, was based, and that similar paragraphs could be found in other conventions recently prepared by UNCITRAL, such as the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) or the United Nations

Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the “Rotterdam Rules”). It was further said that the notion of trade in the context of UNCITRAL texts was to be understood broadly as to include investment.

35. After discussion, the Working Group agreed to consider further at its second reading of the transparency convention whether to retain or delete these paragraphs or replace them by a single paragraph recalling the mandate of UNCITRAL.

*Reference to the mandate of the Working Group in the preamble*

36. Reference was made to the forty-sixth session of the Commission where the Commission agreed that there was not, and should not be, any value judgement attached to whether a State decided to accede to the transparency convention, and that pressure ought not be brought to bear on States to accede to a convention. At that session, it was said that that matter could be clarified, for instance, in the preamble to the transparency convention.<sup>11</sup>

37. In that light, the Working Group considered whether language recalling the mandate of the Working Group as proposed by the Commission (see above, paras. 3 and 13) could be included in the preamble. It was said that adding such a provision in the preamble would give the necessary level of confidence to States that are not ready to adopt a convention on transparency that no pressure would be brought to bear on them to do so.

38. It was said in response that including such language, even as a recollection of a mandate given to the Working Group, in the preamble, would be awkward for Contracting Parties to the transparency convention to accept. It was said that a Contracting Party ought not to have to recall the fact that other States were not obliged to sign the transparency convention, and that to the contrary, a Contracting Party would hope that other States did accede to the transparency convention in order that it would come into effect.

39. A proposal was made to include in the preamble, in addition to the mandate of the Commission to the Working Group, as set out in paragraph 3 of document A/CN.9/WG.II/WP.179 (see also above paras. 3 and 13), the decision of the Commission adopting the Rules on Transparency, as set out in paragraph 2 of document A/CN.9/WG.II/WP.179 (see also above para. 3). It was agreed that the two mandates were not mutually incompatible.

40. By way of alternative, it was suggested that, as with other United Nations conventions, the mandate of the Working Group could be recalled in the General Assembly resolution recommending the text of the transparency convention, but that the preamble itself not include that language. That proposal received some support.

41. After discussion, it was agreed that the preamble would not include any text intended to reflect the mandate given by the Commission to the Working Group, but that the proposal for the General Assembly resolution recommending the transparency convention contain wording along the lines of the following: “Recalling that the Commission recommended that the Rules on Transparency be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to investment treaties concluded before the coming into effect of the Rules on Transparency, to the extent such application is consistent with those investment treaties; Recalling that the Commission decided to prepare a convention that was intended to give those States that wished to make the Rules on Transparency applicable to their existing investment treaties an efficient mechanism to do so, without creating any expectation that other States would use the mechanism offered by the convention; Acknowledging that the Rules on Transparency might be made applicable to investor-State arbitration initiated pursuant to investment treaties concluded before the date of coming into effect of the Rules on Transparency by means other than a convention ... Calls upon those Governments that wish to make the Rules on Transparency applicable to arbitrations under their existing investment treaties to consider becoming party to the Convention”.

42. A subsequent proposal was made to delete, in the fifth paragraph of the preamble of the transparency convention, the words “fair and efficient settlement of international [investment] disputes” and replace that language with the words “transparency of such arbitration”. That proposal did not receive support.

<sup>11</sup> Ibid., para. 123.

*Concluding remarks*

43. Subject to further consideration of the first two paragraphs of the preamble, to be determined at the second reading of the transparency convention, and in light of its discussions resulting in the text set out above in paragraph 41, the Working Group found, at its first reading, the preamble as contained in paragraph 5 of document A/CN.9/784 acceptable in substance.

**2. Draft article 1 — Scope of application***Draft proposal*

44. The Working Group proceeded to consider a proposal that would replace articles 1 and 3, as set out in paragraph 5 of document A/CN.9/784, as follows (the “draft proposal”): “1. Subject to Article 4, each contracting party to this Convention (“Contracting Party”) agrees that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Transparency Rules”) shall apply to any Covered Arbitration conducted pursuant to an Investment Treaty to which it is a party that is concluded before April 1, 2014. 2. The term “Covered Arbitration” means any arbitration between a Contracting Party and a claimant of another Contracting Party conducted pursuant to an Investment Treaty. 3. The term “Investment Treaty” means any bilateral or multilateral investment treaty to which two or more Contracting Parties are parties that contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty. 4. Where a Contracting Party that is a disputing party to Covered Arbitration has otherwise agreed to apply standards of transparency in that arbitration that require a higher degree of transparency than that provided by the Transparency Rules in any particular respect, this Convention shall not prevent the application of that higher standard.”

45. It was explained that the basis for the draft proposal was twofold. First, it was intended to clarify matters of drafting, and it was said that defining terms as the draft proposal did, would eliminate undue repetition in the text of the transparency convention. Second, and more substantively, it was said that the combined effect of articles 1 and 3 as set out in paragraph 5 of document A/CN.9/784 might provide for a broader application of the transparency convention than intended. Specifically, it was said in that respect that in the context of multilateral investment treaties, articles 1 and 3 might oblige Contracting Parties to the transparency convention to offer the Rules on Transparency to an investor from a State that was Party to the multilateral treaty, but not a Contracting Party to the transparency convention.

46. It was clarified that article 1 of the draft proposal did not address the question of unilateral offer to arbitrate by a Contracting Party to the transparency convention (see above, paras. 23 to 29).

47. The question was raised whether the structure proposed under articles 1 and 3 of the transparency convention as contained in paragraph 5 of document A/CN.9/784 should be retained in order to differentiate between the material scope of application of the transparency convention and the substantive obligations of Contracting Parties under the transparency convention.

48. In response, it was suggested that one could attain the same effect by linking the scope of application to obligations of the Contracting Parties, as set out in the draft proposal, as by having a general provision on scope and a separate provision on the obligations of the Contracting Parties as currently set out in article 3 of document A/CN.9/784. The primary concern was not, it was said, structural, but rather, the need to keep separate the effect of the transparency convention where the home State of the investor and the respondent State had both acceded to the transparency convention, and the effect when only the respondent State had acceded to the transparency convention and purported to make a unilateral offer to investors to use the Rules on Transparency where that investor’s home State was not a Contracting Party to the transparency convention.

*Revised draft proposal*

49. After discussion, a revised draft of articles 1 and 3 was proposed (the “revised draft proposal”), on the basis of the draft of those articles set out in paragraph 5 of document A/CN.9/784, as well as on the draft proposal set out above in paragraph 44.

50. The revised draft proposal in respect of article 1 read as follows: “*Article 1: Scope of application:* 1. This Convention applies to certain investor-State arbitration conducted on the basis of a treaty providing for the protection of investments or investors concluded before April 1, 2014. 2. The term “treaty providing for the protection of investments or investors” means any bilateral or multilateral treaty that contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty. 3. Where a Party to this Convention that is a disputing party to arbitration conducted under a treaty providing for the protection of investments or investors has otherwise agreed to apply standards of transparency in that arbitration that require a higher degree of transparency than that provided by the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Rules on Transparency”) in any particular respect, this Convention shall not prevent the application of those higher standards.”

51. The revised draft proposal in respect of article 3 read as follows: “*Article 3: Use of the Rules on Transparency:* 1. Each Party to this Convention agrees to apply the Rules on Transparency, as may be revised from time to time, to investor-State arbitration to which it is a disputing party conducted pursuant to a treaty providing for the protection of investments or investors to which it is a party, where the State of the claimant is also a Party to this Convention that has not made a relevant declaration under Article 4. [2. Each Party to this Convention also agrees to apply the Rules on Transparency, as may be revised from time to time, to investor-State arbitration conducted pursuant to a treaty providing for the protection of investments or investors to which it is a party, where the State of the investor is not a Party to this Convention or has made a relevant declaration under Article 4, on the condition that the claimant agrees to the application of the UNCITRAL Rules on Transparency.]”

52. The Working Group agreed to proceed on the basis of the revised draft proposal set out above in paragraphs 50 and 51.

*Paragraph (1)**- Temporal limitation*

53. The Working Group considered whether the temporal limitation set out in paragraph (1) of the revised draft proposal, namely, limiting the scope of application of the transparency convention to relevant investment treaties concluded before the entry into force of the Rules on Transparency, ought to be retained, or whether the transparency convention ought to provide Contracting Parties with the means to apply the Rules on Transparency to arbitrations arising under investment treaties concluded both before (“existing investment treaties”) and after (“future investment treaties”) 1 April 2014.

54. Diverging views were expressed on the temporal limitation contained in paragraph 1 of the revised draft proposal. In support of retaining it, it was said that such a temporal limitation would create clarity in relation to the investment treaties to which the transparency convention applied. Moreover, it was pointed out that the mandate given to the Working Group by the Commission was in respect of existing investment treaties only.

55. Concerns were expressed that providing for a temporal limitation in the scope of application of the transparency convention would create a disjunctive situation in relation to the application of the Rules on Transparency. It was explained that under the transparency convention, the Rules on Transparency would apply to disputes arising under relevant investment treaties regardless of the applicable arbitration rules. However, under the Rules on Transparency, parties to a dispute or Contracting Parties would need to agree to apply the Rules on Transparency to non-UNCITRAL Arbitration Rules-based disputes arising under future investment treaties. In that respect, it was foreseeable that where a Contracting Party would wish to apply the Rules on Transparency to disputes arising under existing investment

treaties regardless of the applicable arbitration rules, it might also wish to apply the Rules on Transparency to disputes arising under future investment treaties in the same fashion.

56. It was further said that, although the strict wording of the mandate given to the Working Group by the Commission was in respect of existing investment treaties, the object and purpose of the mandate was to give those States that wished to apply the Rules on Transparency an efficient mechanism to do so, and moreover that the Commission had also consistently underlined the importance of promoting transparency in treaty-based investor-State arbitration. It was said that not including a temporal limitation was within the spirit of such mandate.

57. In order to reconcile the views expressed in relation to the inclusion of a temporal limitation in the application of the transparency convention, it was proposed to delete the temporal limitation but to include a reservation allowing Contracting Parties to limit the scope of application of the transparency convention to existing investment treaties. In response, it was said that an application of the transparency convention to future investment treaties should be the exception, and that consequently Contracting Parties ought to have to formulate a declaration that the transparency convention would apply to future investment treaties.

58. As a consequence of that suggestion, it was agreed to remove the words “concluded before 1 April 2014” from paragraph (1), and to reinsert these words in articles 3(1) and 3(2) on the basis that that relocation would permit such a reservation without contradicting the provision on scope of application.

- *“Concluded”/“Entered into force”*

59. The question was raised whether, in order to define the meaning of an “existing investment treaty”, the word “concluded” as it appeared in paragraph (1) of the revised draft proposal should be replaced by the words “entered into force”.

60. In response, the Working Group was reminded that article 1 of the Rules on Transparency referred to investment treaties “concluded” on or after 1 April 2014. It was said that consistency in that respect was paramount because otherwise investment treaties concluded before 1 April 2014 and entering into force after that date would not be covered by the scope of either instrument.

61. The Working Group was further reminded of the discussions that had taken place during the deliberations on the Rules on Transparency where the Working Group decided that the words “entered into force” used in the initial drafts of the Rules on Transparency should be replaced by the word “concluded” because it was at the time of conclusion of the investment treaty (and not at the time of its coming into force) that Parties might consent to the application of the Rules on Transparency (see A/CN.9/WG.II/WP.169, para. 12).

62. Finally, it was said that the Rules on Transparency could not in any event apply to investment treaties that had been concluded but not entered into force.

63. After discussion, the word “concluded” was retained.

- *“Certain”*

64. The Working Group considered the meaning and utility of the word “certain” as it appeared in paragraph (1) of the revised draft proposal. It was said in support of the inclusion of that word that its purpose was avoid a broader application of the transparency convention than intended, as highlighted above in paragraph 45. However it was generally felt that the word “certain” was ambiguous.

65. After discussion, it was agreed to delete the word “certain”, it being understood that article 1 dealt with the general scope of application of the transparency convention and that limitations in relation thereto were to be expressed under other provisions of the transparency convention.

- *Conclusion*

66. Further to the deliberations on paragraph (1) of the revised draft proposal, that paragraph would read as follows: “This Convention applies to investor-State arbitration conducted on the basis of a treaty providing for the protection of investments or investors.”

*Paragraph (2)*

67. The Working Group proceeded to consider paragraph (2) of the revised draft proposal.

68. It was said that the defined term “treaty providing for the protection of investments or investors” could be more concise, and better reflect the approach adopted under the Rules on Transparency, were that term to be instead defined as “treaty” (as contained in the first footnote to article 1(1) of the Rules on Transparency).

69. A suggestion was made to define that term instead as “investment treaty”, which it was said would be more appropriate in the context of the transparency convention.

70. A separate point was raised in relation to the slight difference between the definition of the term “treaty” as contained in the Rules, which included the words “shall be understood broadly as encompassing”, and the term as defined in the revised draft proposal, which omitted those words. In that respect, it was clarified that in relation to the former, the definition was intended to give guidance to users of the Rules, whereas in a convention, the definition needed to be clearly set out.

71. After discussion, it was agreed that the words “treaty providing for the protection of investments or investors” would be replaced by the word “treaty” and, as an alternative, “investment treaty”, both in square brackets, for consideration by the Working Group at its second reading of the transparency convention.

*Paragraph (3)*

- *“Unless otherwise agreed to apply standards ... that require a higher degree of transparency”*

72. It was queried in relation to paragraph (3) of the revised draft proposal what the words “unless otherwise agreed” signified in practice. In response, it was clarified that the aim of that phrase was to include flexibility in the situation where the transparency convention would normally apply to bring in the Rules on Transparency, but where the disputing parties to the arbitration and/or the Parties to the relevant investment treaty had agreed to higher levels of transparency than those provided for in the Rules on Transparency through a mechanism outside the transparency convention.

- *A higher degree of transparency*

73. As a general matter, it was suggested that referring to a standard requiring a higher degree of transparency itself posed various difficulties, including (i) the determination of what might constitute a higher or a lower degree of transparency where treaty or rules-based obligations differed would be difficult and possibly litigious, both in relation to a provision-by-provision assessment and when considering transparency regimes as a whole; (ii) whether there would have to be a requirement to apply the higher degree of transparency; and (iii) what the consequences might be if the arbitral tribunal were to apply a standard which would not be considered as the highest one.

74. It was considered whether and how to give the arbitral tribunal discretion to make that determination.

75. Concerns were expressed regarding how a higher standard would be determined and applied, given existing investment treaties that contained extensive transparency provisions which were different than those set out in the Rules on Transparency, but which were not necessarily “higher” or “lower” standards.

76. A suggestion was made that, rather than pursue such a determination, it might be more efficient for Contracting Parties wishing to preserve the application of what that Contracting Party perceived as a higher standard in existing investment treaties, to reserve those specific investment treaties from the application of the transparency convention.

77. A suggestion to delete paragraph (3) altogether, on the basis that, as a successive treaty, the transparency convention would prevail in relation to the transparency provisions in an existing investment treaty, was considered to give rise to the following difficulty: the transparency convention obliged each Contracting Party to apply the Rules on Transparency, but article 1(7) of the Rules on Transparency set out that where the Rules conflicted with the relevant investment treaty, the provisions of that investment treaty would prevail. Consequently, should an investment treaty set out a lower standard of transparency to that in the Rules on Transparency, that lower standard would prevail under such an interpretation (see also below, para. 101).

- *Conclusion*

78. After discussion, the Working Group identified the basis on which it would proceed to its second reading.

79. First, it was agreed that, for the reasons identified above in paragraph 77, the second sentence of article 1(7) of the Rules on Transparency ought to be carved out of the obligations of Contracting Parties to apply the rules on transparency, as set out in article 3 of the revised draft proposal.

80. Second, it was also noted that as a successive treaty pursuant to article 30 of the Vienna Convention, the transparency convention would prevail to the extent of any conflict over any pre-existing transparency regimes contained in investment treaties to which the transparency convention applied; therefore, it was not necessary to create a complex provision in relation to a hierarchy of transparency standards in the transparency convention. Contracting Parties that wished to apply a higher or different standard of transparency as contained in existing investment treaties would be required to reserve the application of the transparency convention in relation to those investment treaties.

81. In relation to disputing parties, reference was made to article 1(3)(a) of the Rules on Transparency, in relation to which agreement was expressed that that provision as drafted allowed disputing parties to agree to a higher standard of transparency than that provided for in the Rules on Transparency.

82. Further to the considerations set out above in paragraphs 78 to 81, it was agreed to delete paragraph (3) of the revised draft proposal.

### 3. Draft article 2 — Interpretation

83. The Working Group considered draft article 2 as contained in paragraph 5 of document A/CN.9/784.

84. A suggestion was made to delete article 2. It was said in support of that proposition that although the language in article 2 was standard for commercial law treaties, usually that wording would be used when a treaty set out requirements for application and implementation within a Contracting Party's domestic legal framework, to ensure or encourage that the national court of a Contracting Party interpreted the treaty internationally rather than in line with that country's domestic law. It was said however that in the context of the transparency convention, the intended audience were the Contracting Parties themselves, as well as disputing parties and arbitral tribunals, and that in that context the provision was unnecessary.

85. In response, it was said that the provision was included in a number of other UNCITRAL instruments. It was said that on the one hand, consistency ought to be maintained as between UNCITRAL texts where possible, and that moreover, if it were to be deleted, negative inferences could be drawn when the transparency convention was interpreted in the future. It was furthermore observed that the substance of article 2 was applicable to the transparency convention.

86. In response, it was said that the transparency convention was not of the same nature as other UNCITRAL instruments, which were private law instruments, and that the article could generate confusion when read alongside article 31 of the Vienna Convention. In response, it was said that the two provisions were compatible. A suggestion to include reference to the Vienna Convention in article 2 did not receive support.

87. A further suggestion, to retain article 2 but to delete the words “and the observance of good faith in international trade”, did not receive support.

88. After discussion, it was agreed that two options remained in relation to article 2, namely to retain it in the form set out in paragraph 5 of document A/CN.9/784, or to delete it. The Working Group agreed to consider that matter further at its second reading of the transparency convention.

#### 4. Draft article 3 — Use of the UNCITRAL Rules on Transparency

89. The Working Group considered article 3 of the revised draft proposal, as set out above in paragraph 51.

##### *Paragraph (1) of the revised draft proposal (para. 51 above)*

90. Pursuant to its consideration of article 1, it was clarified that (i) the term “treaty providing for the protection of investments or investors” would be replaced with the definition of that term ([“treaty”/“investment treaty”]) (see above para. 71); (ii) the words “concluded before 1 April 2014” would be added after that defined term (see above, para. 58); and (iii) consideration would be given to language in order to carve out the second sentence of article 1(7) of the Rules on Transparency.

##### *- Dynamic language*

91. Some delegations expressed concern with the language incorporating the Rules on Transparency “as may be revised from time to time”, on the basis that such dynamic language might not provide sufficient certainty as to the scope of application of the transparency convention should the Rules be revised.

92. In response, it was said that the Rules on Transparency were a new standard and that the transparency convention ought not to exclude the possibility of updating the Rules. To address the concerns expressed above in paragraph 91, it was proposed that the transparency convention could provide for a Contracting Party to formulate a reservation precluding the application of amended Rules if it so wished.

93. After discussion, it was agreed to proceed on the basis of the compromise set out in the last sentence of paragraph 10 of document A/CN.9/WG.II/WP.179, namely that any Contracting Party could, in the event of a revision of the Rules on Transparency, formulate a reservation indicating that the Rules on Transparency, as revised, would not apply within [x] months of the date of adoption of such revision, and before that revision were to come into force (see below, paras. 100, and 142-146).

##### *- “Where the State of the claimant is also a Party to this Convention that has not made a relevant declaration under Article 4”*

94. Having regard to the subordinate clause of paragraph (1) of article 3 of the revised draft proposal, it was queried whether it was necessary to refer to the possibility of a declaration/reservation in a provision setting out the obligations of Contracting Parties. It was suggested that a simpler drafting approach might be to replace the words “where the State of the claimant is also a Party to this Convention that has not made a relevant declaration under Article 4” with the words “where the State of the claimant is also a party to this Convention with respect to that treaty”.

95. It was observed that the drafting in that respect might require further consideration both because it was potentially linked to the drafting of article 4 in relation to reservations, and because the term “State of the claimant” instead of “Contracting Party” might lead to difficulties for example in relation to regional economic integration organizations (see below, para. 129).

##### *New proposal on article 3*

96. A revised proposal in relation to article 3(1) was put forward, split into two paragraphs, under which (i) the instances where the Rules on Transparency could be made applicable were more clearly set out; and (ii) it was made clear that the transparency convention would apply in relation to disputes arising under the relevant investment treaty whether conducted



under the UNCITRAL Arbitration Rules or not, taking account of articles 1(2)(b) and 1(9) of the Rules on Transparency.

97. That new proposal read as follows (the “new proposal on article 3”): “*Article 3: Use of the Rules on Transparency*: 1. Each Party to this Convention agrees to apply the Rules on Transparency, as may be revised from time to time, to any investor-State arbitration (whether conducted under UNCITRAL Arbitration Rules or otherwise): a. in which it is a disputing party; b. that is conducted pursuant to an Investment Treaty concluded before April 1, 2014 to which it is a party and to which it has not made a declaration under Article 4; and c. in which the claimant is of a Contracting Party that has not made a declaration regarding that Investment Treaty under Article 4. 2. In the event of a conflict between such an Investment Treaty and the Rules on Transparency, notwithstanding any provision in the Rules on Transparency regarding such conflicts, the Rules on Transparency shall apply pursuant to paragraph 1.”

*Paragraph (1) of the new proposal on article 3*

98. It was suggested that, in relation to the reference to declarations under paragraphs (1)(b) and (c) of the new proposal on article 3, because declarations/reservations would apply irrespective of whether they were mentioned in that provision, the language “and to which it has not made a declaration under Article 4” in subparagraph (b), and “that has not made a declaration regarding that Investment Treaty under Article 4” in subparagraph (c), would be placed in square brackets for further consideration. For the sake of consistency, such a reference to declarations/reservations would either be retained in both subparagraphs, or deleted from both.

99. As a matter of drafting it was also said that in relation to subparagraph (b), the phrase (now in brackets) “to which it has not made a declaration”, if retained, ought to be replaced by “in respect of which it has not made a declaration”.

100. A concern was expressed in relation to the dynamic wording in paragraph (1) of the new proposal on article 3, in response to which it was said that the solution arrived at previously, and as set out above in paragraph 93, was that the dynamic wording would be retained, but that an option to formulate a reservation in that respect would be included in article 4 of the transparency convention. After discussion, it was agreed that that approach would serve as the basis for the first reading of article 4.

*Paragraph 2 of the new proposal on article 3*

101. In relation to paragraph (2) of the new proposal on article 3, it was clarified that that paragraph was intended to address the potential for article 1(7) of the Rules on Transparency to undermine the object of the transparency convention in relation to existing investment treaties (see above, para. 77). By way of further clarification, it was said that, while article 1(7) of the Rules on Transparency worked in relation to the application of the Rules on Transparency to future investment treaties, when considered in relation to the transparency convention, which would expressly import the application of the Rules on Transparency into existing investment treaties, the Rules would then indicate that the provisions of that existing investment treaty, which may be inconsistent with the Rules, would apply, which would be circular in that it would (or at least might) prevent the application of the Rules which the transparency convention was intended to bring into effect.

102. It was said that delegations would review their existing investment treaties to determine whether, as an alternative, there might be a way by which, in practice, an assessment could be made between the transparency provisions in an existing investment treaty and those in the Rules on Transparency, and the higher standard of the two, applied. It was said however that the deliberations of the Working Group had highlighted that considerable difficulties seemed to exist in identifying the standard that an arbitral tribunal would be able to apply in that respect (see above, paras. 73 to 77).

103. It was said as a matter of drafting that the word “such” qualifying the term “Investment Treaty” in paragraph (2) of the new proposal on article 3 might require clarification to ensure that the investment treaties to which it referred were clear. The Working Group requested the Secretariat to modify language in the transparency convention where necessary to ensure clarity of drafting.

*Paragraph (2) of the revised draft proposal (unilateral offer)/Paragraph (3) of the new proposal on article 3*

104. The Working Group proceeded to consider paragraph (2) of article 3 of the revised draft proposal (as contained above in para. 51). It was said that in principle such a provision, permitting Contracting Parties to make a unilateral offer to investors from non-Contracting Parties, served a useful purpose in a convention such as the transparency convention.

105. After discussion, and in light of various drafting suggestions including to make the draft consistent with the new proposal on article 3, it was suggested to redraft paragraph (2) of the revised draft proposal (as contained above in para. 51), with the following text, which would become the third paragraph in the new proposal on article 3: “3. Each Party to this Convention also agrees to apply the Rules on Transparency, as may be revised from time to time, to investor-State arbitration (whether conducted under UNCITRAL rules or otherwise): a. in which it is a disputing party; b. that is conducted pursuant to an Investment Treaty concluded before April 1, 2014, to which it is a party and in respect of which it has not made a declaration under Article 4; and c. where the State of the claimant is not a Party to this Convention or has made a relevant declaration under Article 4, on the condition that the claimant agrees to the application of the UNCITRAL Rules on Transparency.”

106. A number of delegations expressed support for the inclusion of that provision. Other views were expressed that it would be problematic to include a provision that did not include an element of reciprocity as between Contracting Parties in relation to the application of the Rules on Transparency.

107. It was clarified that paragraph (3) as set out above in paragraph 105 applied to existing investment treaties, but would also apply to future investment treaties were a Contracting Party to formulate a declaration to that effect (see above, para. 57). In relation to existing investment treaties, it was said that the transparency convention could permit a Contracting Party to formulate a reservation precluding the application of paragraph (3).

108. A suggestion to include, at the end of paragraph (3), the phrase “and it is not prohibited by the investment treaty”, did not receive support.

109. It was considered whether the paragraphs in the new proposal on article 3 (including paragraph (3) as set out above in para. 105) would need to be reordered such that paragraph (2) would come after paragraphs (1) and (3).

110. It was said that paragraph (2) might not apply to paragraph (3), because in the case of a unilateral offer by a Contracting Party to a claimant from a non-Contracting Party, where there was a conflict between the provisions of the Rules on Transparency and those of the underlying investment treaty, the provisions of the underlying investment treaty ought to prevail in accordance with article 1(7) of the Rules on Transparency.

111. A different view was expressed that paragraph (2) should be made applicable to both paragraphs (1) and (3), as in both situations, there was a possibility of conflict with the underlying investment treaty; in relation to paragraph (3), where a unilateral offer to apply the Rules on Transparency was made, it would not be logical to apply the provisions of the investment treaty instead where that offer was accepted.

112. After discussion, it was agreed not to restructure the provision until further consideration had been given as to whether paragraph (2) applied to both paragraphs (1) and (3).

113. It was also questioned whether a Contracting Party, by excluding through a reservation the application of paragraph (3), would then be prevented from availing itself of the mechanism under article 1(2)(a) of the Rules on Transparency, under which a State and a disputing party could agree to the application of the Rules in UNCITRAL arbitrations pursuant to an existing investment treaty. In response, it was clarified, and agreed, that a reservation in respect of the provisions of paragraph (3) would mean that a State was not willing to make a global unilateral offer for the application of the Rules on Transparency at a given point in time. However, that was not inconsistent with such a State agreeing to the application of the Rules on Transparency to a specific arbitration in accordance to article 1(2)(a) of such Rules at a later point in time.

114. In light of the discussions set out above, and particularly in light of the clarification set out above in para. 107, the Working Group agreed to proceed on the basis of the new proposal on article 3 for its second reading of the transparency convention.

## 5. Draft article 4 — Reservations

115. The Working Group considered draft article 4 as contained in paragraph 5 of document A/CN.9/784.

### *List of reservations or declarations*

116. Pursuant to the discussions of the Working Group, the subject matters on which reservations or declarations could be made under the transparency convention were listed as follows: (i) exclusion of (a) certain investment treaties; (b) the application of a future revised version of the Rules on Transparency; (c) arbitration under certain arbitration rules; (d) the application of article 3(3); and (ii) a declaration for the application of the transparency convention to future investment treaties.

117. It was noted that the reservations under item (i) in paragraph 116 above aimed at limiting the scope of application of the transparency convention, whereby the declaration under item (ii) aimed at expanding its application to future investment treaties. It was suggested that the items listed under paragraph 116 above should be characterized under article 4 as declarations (for further discussion on the matter, see below, paras. 134-137).

### *Most Favoured Nation (“MFN”) clauses*

118. As a matter of principle, it was questioned whether a MFN clause in an investment treaty could be triggered by a carve-out of certain investment treaties from the transparency convention. In other words, if, for example, of three Contracting Parties to the transparency convention, one (Contracting Party A) had reserved from the scope of that convention one of its bilateral investment treaties with another Contracting Party B, but not that with Contracting Party C, an investor from Contracting Party C might seek to refer to an MFN clause in the bilateral investment treaty between Contracting Parties A and C under which it was initiating proceedings, which investment treaty had not been reserved from the scope of the transparency convention, to claim that it was entitled to non-transparent arbitration pursuant to the non-transparent regime under the investment treaty between Contracting Parties A and B.

119. It was suggested that MFN clauses would not be triggered in the context of the transparency convention, which applied a procedural regime of transparency rather than addressing the treatment of investors or promotion of investment. However, it was pointed out that arbitral practice was not uniform in relation to that matter. In any event, it was clarified that the deliberations of the Working Group on that matter should not be interpreted as taking a position on the question of whether MFN clauses applied to dispute settlement procedures under investment treaties.

120. It was suggested that an approach that might address that concern, at the level of the rights of the investor, might be to include wording in the transparency convention along the following lines: “A claimant may not avoid the application of the Rules on Transparency by invoking the provisions of another treaty on the basis of a MFN clause.” It was further suggested that language could also be inserted in order to capture the converse possibility, namely when a claimant under an investment treaty reserved from the application of the transparency convention tried to use a MFN clause to make the rules on transparency applicable to its arbitration notwithstanding that reservation.

121. It was agreed that the Working Group would proceed to its second reading on the basis of the suggestion set out above in paragraph 120, adapted by the Secretariat to capture that converse possibility.

### *Scope of reservations*

122. In relation to the scope of reservations and the manner in which they ought to be framed, it was clarified that it would be contrary to the mandate given by the Commission to the Working Group to provide that the transparency convention would apply only to

investment treaties positively listed by States when adopting the transparency convention; rather it would be for States wishing to carve out certain treaties from the transparency convention to list the excluded treaties in their reservation. The Working Group agreed with that clarification.

#### *Timing of reservations*

123. It was queried whether reservations or declarations could be made at any time or only at the time of entry into force of the transparency convention for the Contracting Party concerned.

124. It was pointed out that article 4 as contained in paragraph 5 of document A/CN.9/784 permitted reservations to be made at any time after accession. A concern was expressed in that respect that under such a provision a Contracting Party might lodge a reservation in relation to a certain treaty if an investment dispute under that treaty became foreseeable.

125. It was said that two options existed in relation to the timing of reservations. First, the timing could be left completely open such that reservations or declarations could be made at any time, but there would then be a need to create at least a temporal mechanism to prevent abuse (e.g. with a declaration/reservation coming into force a certain amount of time after being notified to the depositary), and second, declarations or reservations could be available only at accession, with the only subsequent possibility being withdrawal of a declaration or reservation made at accession.

126. It was agreed to consider that matter further at a later stage of the deliberations (see below, paras. 149 to 157).

#### *Article 4 proposal*

127. Bearing in mind the list of reservations and declarations identified above in paragraph 116, a draft proposal in relation to article 4 was made (“article 4 proposal”). It was suggested to proceed on the basis of that draft, which read as follows: “*Article 4 — Declarations*: 1. A Contracting Party may declare any or all of the following: a. that Investment Treaties that are specifically listed in the declaration are not subject to article 3.1; b. that article 3.1 shall also apply to Investment Treaties concluded after April 1, 2014; c. that article 3.1 shall only apply to arbitrations conducted using certain sets of arbitral rules or procedures authorized for use under an Investment Treaty; d. that article 3.3 shall not apply to that Contracting Party. 2. If a Contracting Party does not make a declaration pursuant to subparagraph d of paragraph 1, that Contracting Party may declare any or all of the following: a. that Investment Treaties that are specifically listed in the declaration are not subject to article 3.3; b. that article 3.3 shall also apply to Investment Treaties concluded after April 1, 2014; c. that article 3.3 shall only apply to arbitrations conducted using the certain sets of arbitral rules or procedures authorized for use under an Investment Treaty. 3. In the event that UNCITRAL revises the Rules on Transparency, a Contracting Party may declare any or all of the following within [X] months of the adoption of such revision: a. that the reference to the Rules on Transparency in article 3.1 shall not be understood to refer to the version of the Rules on Transparency as revised; b. if that Contracting Party has not made a declaration pursuant to subparagraph d of paragraph 1, that the reference to the Rules on Transparency in article 3.3 shall not be understood to refer to the version of the Rules on Transparency as revised. Notwithstanding paragraph 7, any declaration made pursuant to this paragraph takes effect on the date of its receipt by the depositary. 4. Except as provided in this article, no other reservations are permitted to this Convention. 5. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance, or approval. 6. Declarations and their confirmations are to be formally notified to the depositary. 7. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the Contracting Party concerned. [A declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of [six months] after the date of its receipt by the depositary.] 8. Any Contracting Party that makes a declaration under this Convention may [modify or] withdraw it at any time by a formal notification in writing to the depositary. The [modification or] withdrawal is to take effect on the first day of the month following the expiration of [six months] after the date of receipt of the notification by the depositary. 9. This Convention and any declaration apply only to arbitrations that have been commenced after the date when

the Convention or declaration enters into force or takes effect in respect of that Contracting Party. 10. In the event that a Contracting Party [modifies or] withdraws a declaration pursuant to paragraph 8, the declaration shall continue to apply to any arbitration to which article 3.1 or 3.3 applies, if that arbitration has been commenced after the date referred to in paragraph 8 but before the [modification or] withdrawal takes effect.”

128. The Working Group proceeded to consider the article 4 proposal.

*Paragraph (1)*

*- General*

129. It was said that the relationship between the obligations in article 3, which referred to declarations in square brackets (see above, para. 98), and the declarations as they were drafted in paragraph (1) of the article 4 proposal, appeared tautological. It was said in response that, as agreed (see above, paras. 94-95), the relevant wording in article 3 had been placed in square brackets, and the Working Group would accordingly return to that issue during its second reading of article 3.

130. Another suggestion was made, recalling the discussion of the Working Group as set out above in paragraph 113, that the reservation permitted by paragraph (1)(d) contravened one of the fundamental pillars of the Rules on Transparency, namely the ability, in article 1(2)(a) of the Rules, for the parties to an arbitration to agree to their application. That view was not supported, for the reasons set out above in paragraph 113.

*- Policy concern*

131. A policy concern was raised that the list of declarations/reservations set out in the article 4 proposal would permit a country to accede to the transparency convention but effectively to opt out entirely from its scope, pursuant to the reservation listed under paragraph (1)(a), or via a combination of the reservations listed in paragraphs (1)(a) and (1)(c). Furthermore, it was said that, as the reservation under paragraph (1)(d) would allow a Contracting Party to derogate from the application of article 3(3) paragraph (1)(d) should be deleted since, otherwise, application of a basic provision of the transparency convention would be excluded. It was said that that concern might be dealt with by way of drafting, such as including the word “certain” before the word “investment treaties” in paragraph (1). It was also said that it would be unlikely that a Contracting Party would expend the time to accede to the transparency convention but then negate its effect by reserving out of its scope all of that Party’s treaties, and that in any event declarations/reservations would be made public. However, the Working Group acknowledged that it was conceivable that a Contracting Party might so act.

132. After discussion, the Working Group unanimously agreed that it would be unacceptable for a Contracting Party to accede to the transparency convention and then carve out the entire content of the transparency convention by use of the reservations in paragraph (1).

133. The Working Group proceeded to consider whether the text of article 4 ought to reflect that consensus. In that respect, the Working Group had regard to article 19 of the Vienna Convention, as well as to the works of the International Law Commission in relation to the Guide to Practice on Reservation of Treaties (A/66/10/Add.1, the “ILC Guide”, and in particular Guideline 3.1.4), and took the preliminary view that as the issue was dealt with under public international law, there might be no need to include specific wording in the transparency convention to address such a risk of abuse.

*- Declarations or reservations*

134. After discussion, and in light of its consideration of the provisions of the Vienna Convention and the ILC Guide, the Working Group agreed that the declarations as enumerated in article 4 (other than those set out in paragraphs (1)(b) and (2)(b)) were in fact reservations, rather than declarations, and ought to be referred to as such in that article.

135. It was questioned whether, in that respect, those reservations would be subject to objection by Contracting Parties. It was said in response that if the transparency convention

permitted specific reservations, then a Contracting Party could not object to such a reservation being formulated.

136. A question was raised in relation to whether, because paragraphs (1)(b) and (2)(b) of the article 4 proposal enlarged the scope of application of the transparency convention, while the other subparagraphs within paragraphs (1) and (2) limited the scope of application of that convention, those subparagraphs should be separated, and remain as “declarations” rather than “reservations”.

137. Support was expressed for that proposal and the Secretariat was requested to streamline and restructure the article 4 proposal as required.

*Paragraph (1)(c)*

138. It was proposed to modify paragraph (1)(c) of the article 4 proposal so that the effect of the reservation would be to limit the operation of the transparency convention to options to arbitrate under UNCITRAL Arbitration Rules in the reserving Contracting Party’s investment treaties. In that respect, it was suggested to replace the text of paragraph (1)(c) of the article 4 proposal with the following: “that Article 3.1 shall not apply to arbitrations conducted using certain sets of arbitration rules or procedures other than the UNCITRAL Arbitration Rules authorized for use under an Investment Treaty.”

139. That proposal was agreed and the Secretariat requested to streamline and modify the language to the extent required.

*Paragraph (2)*

140. It was suggested that the chapeau of paragraph (2) was unnecessary, first because it was theoretically possible, if unlikely, that a Contracting Party would want to apply the unilateral option mechanism under article 3(3) of the transparency convention to future investment treaties, even where it did not wish to do so for reciprocal obligations, and second, because a single provision in relation to the carve-outs in relation to article 3(3) of the transparency convention might provide for greater clarity in any event.

141. After discussion, the Working Group requested the Secretariat to prepare a revised draft of the article 4 proposal, and to include in that revised draft an option in square brackets along the lines set out above in paragraph 140.

*Paragraph (3)*

142. A suggestion to include a mechanism whereby a Party acceding to the transparency convention after a revision to the Rules on Transparency, but which wanted the previous version of the Rules to apply, could do so, did not receive support.

143. A question was raised in relation to the effect on reciprocity in relation to existing reservations if one Contracting Party were to adopt an amended set of Transparency Rules, and another Contracting Party were not. It was said there would no longer be reciprocity in respect of pre-existing reservations, and that a rule would need to be included to provide that when such a situation arises, the pre-existing Rules on Transparency would still apply in relation to those reservations.

144. In response, it was said that where one Contracting Party A made a reservation in relation to the applicability of an amended set of Rules on Transparency, that should not deprive another Contracting Party B of offering those amended Rules under paragraph (1) of article 3 (e.g., in relation to an arbitration with a claimant from Contracting Party A). It was suggested that wording could be included in the transparency convention to the effect that Contracting Parties agreed that such a reservation would apply only to arbitral proceedings to which the reserving Contracting Party was a party.

145. It was agreed that the Secretariat would propose language to that effect.

146. In relation to the timing applicable to a reservation under paragraph (3), it was agreed to proceed on the basis of six months.

*Paragraph (4)*

147. A suggestion that paragraph (4) was not necessary did not receive support. It was said that there was a clear indication of consensus that the only reservations ought to be those enumerated, subject to any further instructions delegations might require from their Governments.

*Paragraphs (5) and (6)*

148. After discussion, it was agreed that the language in paragraphs (5) and (6) constituted standard wording in treaties and ought to be retained.

*Paragraph (7)*

149. The Working Group recalled its discussions as set out above in paragraphs 123 to 126, including its determination that two options existed in relation to the timing of a reservation: either at the time of accession, or subsequently, with a mechanism to avoid abuse.

150. It was said that consideration would need to be given in relation to an anti-abuse mechanism, one element of which would be the timing in relation to which such a reservation would become effective. On the one hand, six months was said to be too short in light of the fact that that standard cooling off periods in investment treaties normally amounted to six or nine months. On the other hand, it was said that if too long a period were specified, a State, or an investor, might take advantage of that period in a way that might defeat the objective of transparency.

151. After discussion, it was agreed that, if reservations were to be allowed after accession, a point on which further deliberations would be needed, then a one-year period after the date of receipt by the notification of the repository should be required before the entry into force of the reservation.

152. Another suggestion was made to consider in addition to timing, as an anti-abuse mechanism, that where both the home State of an investor and the State of a respondent, were Contracting Parties to the transparency convention, the agreement of both States would be required in order to exclude the relevant investment treaty. That suggestion did not receive support.

*Paragraph (8)*

153. The Working Group considered in relation to paragraph (8) of the article 4 proposal whether Contracting Parties ought to be able to modify existing reservations.

154. It was said that if the possibility was provided for Contracting Parties to make a later reservation under paragraph (7), then that possibility could be used to withdraw or modify a previous reservation thus negating the need for paragraph (8). In response, it was said that retaining the possibility of withdrawing a previous reservation rather than simply lodging a new one would avoid confusion.

155. It was also said that were later reservations to be permitted, the time period in which to do so ought to be consistent with the time period in which to make a modification or withdrawal under paragraph (8). The Working Group recalled that the period it had agreed upon in relation to that period under paragraph (7) was one year (see above, para. 151).

156. It was recalled that that period had been considered sufficient to prevent abuse, but that conversely, it might also comprise too long a period should a Contracting Party wish to modify or withdraw a reservation that would have the effect of making the regime applicable to that Party more, rather than less, transparent.

157. In that respect, the Secretariat was requested to draft language creating a mechanism providing for a shorter period of time if the withdrawal or modification provided for greater transparency, for consideration at the second reading of the transparency convention.

*Paragraph (9)*

158. The Working Group agreed that that paragraph, which mirrored article 10 of the draft transparency convention as contained in paragraph 5 of A/CN.9/784 (time of application)

should form the subject of a separate article in relation to the timing of application of the transparency convention in respect of the arbitral proceedings.

**6. Draft article 5 — Depository**

159. The Working Group agreed to retain the substance of draft article 5 as contained in paragraph 5 of document A/CN.9/784.

**7. Draft article 6 — Signature, ratification, acceptance, approval, accession**

160. The Working Group considered draft article 6 as contained in paragraph 5 of document A/CN.9/784.

*Paragraph (1)*

161. It was proposed to amend paragraph (1) as follows: “This Convention is open until [date] for signature by (a) any State that is party to [an investment treaty][a treaty]; or (b) a regional economic integration organization constituted by sovereign States that is party to [an investment treaty][a treaty].”

162. It was agreed to proceed on the basis of that proposal for the second reading of the transparency convention.

*Paragraph (2)*

163. Pursuant to paragraphs 161 and 162 above, it was agreed to replace the words “signatory Parties” by the words “signatories to this Convention”.

*Paragraph (3)*

164. For the sake of clarity, it was agreed to amend paragraph (3) to read as follows: “This convention is open for accession by all States that are not signatory States as from the date it is open for signature”.

**8. Draft article 7 — Effect in territorial units**

165. The Working Group considered draft article 7 as contained in paragraph 5 of document A/CN.9/784.

166. A suggestion was made to delete article 7 for the reason that such a provision was not entirely relevant with respect to the legal application of the transparency convention and in particular whether such application had different effect within different territorial units. In response, it was said that territorial units could be Parties to investment treaties, and that article 7 therefore retained some relevance.

167. After discussion, it was agreed that that provision should be retained for the second reading on the basis of an amended version wherein the phrase in paragraph (1) “in which different systems of law are applicable in relation to the matters dealt with in this Convention,” would be deleted, and replaced by the phrase: “which are parties to [investment treaties][treaties] in their own name”. Delegations, and particularly those directly concerned by the matters addressed by the revised article 7, were invited to consult internally in advance of the second reading to ensure that such a draft would operate satisfactorily.

**9. Draft article 8 — Participation by regional economic integration organizations**

168. The Working Group considered draft article 8 as contained in paragraph 5 of document A/CN.9/784.

169. An initial suggestion, which received support, was made to delete article 8, save for the last sentence of paragraph (1), and the entirety of paragraph (3). It was said that both those provisions ought to be retained and relocated where appropriate within the transparency convention. In support of that proposal, it was pointed out that the definition of a regional economic integration contained in the first sentence of paragraph (1) was not necessary, as that matter was covered under article 6 (1) (see above, para. 161).



170. That suggestion was agreed and the Secretariat was requested to proceed on that basis.

**10. Draft article 9 — Entry into force**

171. The Working Group considered draft article 9 as contained in paragraph 5 of document A/CN.9/784.

*Paragraph (1)*

172. A proposal was made that the number of Parties required to consent to be bound by the transparency convention (by reference to the deposit of an instrument of ratification, acceptance, approval or accession; hereinafter, “signatories”) in order for it to enter into force ought to be two. It was said in response that that number was not high enough, and that more signatories ought to be required for the transparency convention to enter into force in order for it to achieve a degree of universality, enhance its significance and make it more attractive to potential signatories.

173. In support of the suggestion for a lower number of signatories, such as two or three, for the transparency convention to enter into force, it was said, inter alia, that the mandate given to the Working Group was to create an efficient mechanism for those States that wanted to apply the Rules on Transparency to be able to do so, and requiring a great number of States to sign the transparency convention before it came into effect would undermine that objective; that specifically, the transparency convention was intended to give effect to article 1(2)(b) of the Rules on Transparency, which envisaged a bilateral application, in relation to which those States that wanted to apply it ought not to be impeded; and that efficiency in that respect and in relation to a portfolio of existing investment treaties could not be attained by applying the Rules to existing investment treaties on a bilateral basis. It was added that while it was desirable that a great number of parties signed the transparency convention, a great number ought not to have to sign in order for it to come into effect.

174. After discussion, consensus was achieved in relation to the number of signatories to be required for the transparency convention to enter into force, that number being three. The goodwill of delegations in arriving at that consensus was acknowledged.

*Paragraph (2)*

175. A proposal that the language in paragraph (2) be made consistent with paragraph (1) of article 6 was accepted.

**11. Draft article 10 — Time of application**

176. In relation to draft article 10 as contained in paragraph 5 of document A/CN.9/784, the Working Group recalled its discussions on that provision in the context of article 4(9) (see above, para. 158).

**12. Draft article 11 — Revision and amendment**

177. The Working Group considered draft article 11 as contained in paragraph 5 of document A/CN.9/784. A proposal was made to delete that article altogether on the basis that the function it served was addressed under article 40 of the Vienna Convention.

178. After discussion, it was agreed to retain article 11, on the basis that it provided for greater detail and clarity than the Vienna Convention. It was further agreed that the words “, or any reservation” were not required and should be deleted.

**13. Draft article 12 — Denunciation of this Convention**

179. The Working Group considered draft article 12 as contained in paragraph 5 of document A/CN.9/784. After discussion, the Working Group agreed to retain the substance of that provision.

**B. Note by the Secretariat on settlement of commercial disputes:  
Application of the UNCITRAL Rules on Transparency in Treaty-based  
Investor-State Arbitration to existing investment  
treaties — Draft convention  
(A/CN.9/WG.II/WP.179)**

**[Original: English]**

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**I. Introduction**

1. At its forty-third session (New York, 21 June-9 July 2010), with respect to future work in the field of settlement of commercial disputes, the Commission entrusted its Working Group II with the task of preparing a legal standard on transparency in treaty-based investor-State arbitration.<sup>1</sup> At its forty-fourth session (Vienna, 26 June-8 July 2011), the Commission confirmed that the question of applicability of the legal standard on transparency to investment treaties concluded before the date of adoption of the rules on transparency (“existing investment treaties”) was part of the mandate of the Working Group and a question of great practical interest, taking account of the high number of investment treaties currently in existence.<sup>2</sup> In that context, the Working Group discussed the options of making the rules on transparency applicable to existing investment treaties either by way of a convention, whereby States could express consent to apply the rules on transparency to arbitration under their existing investment treaties, or by a recommendation urging States to make the rules applicable in the context of treaty-based investor-State dispute settlement. The possibility of making the rules on transparency applicable to existing investment treaties by joint interpretative declaration pursuant to article 31(3)(a) of the Vienna Convention on the Law of Treaties (the “Vienna Convention”), or by an amendment or modification of a relevant treaty pursuant to articles 39-41 of the Vienna Convention, was also considered by the Working Group.<sup>3</sup>

2. At its forty-sixth session (Vienna, 8-26 July 2013), the Commission adopted the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Rules on Transparency”), together with the UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013). The Commission, in its decision adopting the Rules on Transparency, recommended, *inter alia*, “that, subject to any provision in the relevant investment treaties that may require a higher degree of transparency, the Rules on Transparency be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to investment treaties concluded before the date of coming into effect of

<sup>1</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 190.

<sup>2</sup> *Ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 200. For an online compilation of all investment treaties, see the database of the United Nations Conference on Trade and Development (UNCTAD), available on 29 July 2013 at [www.unctadxi.org/templates/DocSearch\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch___779.aspx).

<sup>3</sup> References to the reports of the Working Group where application of the rules on transparency to existing investment treaties was discussed: A/CN.9/712, paras. 85-94; A/CN.9/717, paras. 42-46; A/CN.9/736, paras. 134 and 135; A/CN.9/760, para. 141; A/CN.9/765, para. 14. Notes by the Secretariat on the matter: A/CN.9/WG.II/WP.162, paras. 22-40; A/CN.9/WG.II/WP.166/Add.1; A/CN.9/WG.II/WP.169/Add.1; A/CN.9/WG.II/WP.176/Add.1.

the Rules on Transparency, to the extent such application is consistent with those investment treaties.”

3. At that session, the Commission “recorded consensus to entrust the Working Group with the task of preparing a convention on the application of the UNCITRAL Rules on Transparency to existing investment treaties, taking into account that the aim of the convention was to give those States that wished to make the Rules on Transparency applicable to their existing investment treaties an efficient mechanism to do so, without creating any expectation that other States would use the mechanism offered by the convention.”<sup>4</sup>

4. The text of the draft convention (“draft convention” or “convention”), with annotations, for consideration by the Working Group is contained in paragraphs 4 to 18 of document A/CN.9/784. This note contains additional remarks on the draft convention.

## II. Matters for consideration

### 1. General matters

5. Article 1, paragraph (2) (b), of the Rules on Transparency provides that in investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before 1st April 2014, the Rules shall apply only when the Parties to the treaty or, in the case of a multilateral treaty, the State of the claimant and the respondent State, have agreed after 1st April 2014 to their application. Article 1, paragraph (9), further provides that the Rules on Transparency are available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules, or in ad hoc proceedings. The purpose of the draft convention is to provide for an efficient mechanism for Parties to investment treaties to express their consent to the application of the Rules on Transparency in the instances referred to under article 1, paragraphs (2)(b) and (9) of the Rules on Transparency.

6. The Working Group may wish to consider whether that mechanism, as embodied in the draft convention, constitutes a new obligation between Parties to that convention, or whether it constitutes an amendment or modification to existing investment treaties to which it relates. The Working Group may wish to consider whether that determination would be different depending on whether an existing investment treaty contains transparency obligations (which would be modified by the Rules on Transparency).

7. Should the Working Group determine that such an additional obligation does not merely constitute a new obligation between the Parties to the convention in relation to investment treaties covered by the scope of the convention, but rather serves to modify or amend existing investment treaties, the Working Group may wish to consider the procedures for amending or modifying treaties contained in Chapter IV of the Vienna Convention. This includes Article 39, which provides as a general rule that “[a] treaty may be amended by agreement between the Parties”, and Article 41 in relation to the procedures for two or more Parties to a multilateral treaty to modify the treaty as between themselves alone. The Working Group may also wish to have regard to any modification or amendment provisions within existing investment treaties (to which Chapter IV of the Vienna Convention applies as a secondary source of law). In particular, the Working Group may wish to consider whether any provision should be added in the draft convention on transparency in relation to the notification obligations attached to proposals to amend or modify existing investment treaties.

### Consistency of definitions

8. The Working Group may wish to note that the definition of the term “treaty providing for the protection of investments or investors” in article 1, paragraph (2) of the draft convention as contained in paragraph 5 of document A/CN.9/784 should be made consistent with the definition of the same term contained in the footnote to article 1 of the Rules on Transparency, such that it reads: “The term ‘treaty’ means any bilateral or multilateral treaty

<sup>4</sup> Report of the Commission on the work of its forty-sixth session, under preparation.

that contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty.”

9. The Working Group may also wish to note that references to the “Rules on Transparency” in the draft convention (in the preamble, and draft article 3), ought to reflect the title of the Rules as adopted by the Commission at its forty-sixth session, namely the “UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration”.

## 2. Draft article 3 — Use of the UNCITRAL Rules on Transparency

### Reference to the Rules on Transparency in the draft convention — Applicable version in case of revision

10. As stated in paras. 9 and 10 of document A/CN.9/784, article 3 of the draft convention proposes a general statement of applicability (article 3) of the Rules on Transparency; in other words, it reflects the agreement of the contracting Parties to apply the Rules on Transparency to arbitrations initiated pursuant to investment treaties concluded before the date of entry into force of the convention but does not reproduce the text of the Rules on Transparency.<sup>5</sup> This raises the question whether article 3 of the draft convention should clarify the version of the Rules on Transparency that is incorporated by reference in the event those Rules would be revised. Another possible approach would be to provide in the draft convention that in the event of a revision of the Rules on Transparency, the Rules on Transparency, as revised, would apply, unless otherwise notified by a Party to the convention within [x] months from the date of adoption of such revision, and before that revision were to come into force.

## 3. Draft article 4 — Reservations

11. In certain cases, States make statements upon signature, ratification, acceptance, approval of or accession to a treaty. Such statements may be entitled “reservation”, “declaration”, “understanding”, “interpretative declaration” or “interpretative statement”. However phrased or named, any such statement purporting to exclude or modify the legal effect of a treaty provision with regard to the declarant is, in fact, a reservation (see article 2 (1) (d) of the Vienna Convention).<sup>6</sup>

12. A reservation may enable a State to participate in a multilateral treaty in which the State would otherwise be unwilling or unable to participate. Draft article 4 contains provisions on reservations. In addition to the remarks contained in paragraphs 12 and 13 of document A/CN.9/784, the Working Group may wish to consider that the draft convention should provide certainty as to the application of the Rules on Transparency to existing investment treaties. Therefore, any reservations permitted under the draft convention should be precise enough to permit parties to a dispute under an investment treaty to ascertain whether the Rules on Transparency are applicable under that treaty.

## 4. Draft article 9 — Entry into force

13. As stated in paragraph 17 of document A/CN.9/784, the basic provisions governing the entry into force of the draft convention are laid down in draft article 9. Three ratifications correspond to the modern trend in commercial law conventions, which promotes early application of those conventions to the extent possible.

14. The Working Group may wish to note that when that matter was discussed by UNCITRAL in the context of the preparation of the United Nations Convention on the Use of Electronic Communications in International Contracts (2005), the Commission noted that

<sup>5</sup> A similar approach has been adopted in the Inter-American Convention on International Commercial Arbitration (“Panama Convention”) which refers, under article 3, to the rules of procedure of the Inter-American Commercial Arbitration Commission, but does not incorporate those rules into the text of that Convention.

<sup>6</sup> See United Nations treaty handbook, section 3.5, page 12, available on 29 July 2013 at <http://treaties.un.org/doc/source/publications/THB/English.pdf>.

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existing UNCITRAL conventions required as few as three and as many as ten ratifications for entry into force.<sup>7</sup>

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<sup>7</sup> *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17 (A/60/17)*, para. 149.

**C. Report of Working Group II (Arbitration and Conciliation) on the  
work of its sixtieth session (New York, 3-7 February 2014)**

**(A/CN.9/799)**

**[Original: English]**

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## I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), with respect to future work in the field of settlement of commercial disputes, the Commission recalled the decision made at its forty-first session (New York, 16 June-3 July 2008)<sup>1</sup> that the topic of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority immediately after completion of the revision of the UNCITRAL Arbitration Rules. The Commission entrusted its Working Group II with the task of preparing a legal standard on that topic.<sup>2</sup>
2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reiterated its commitment expressed at its forty-first session regarding the importance of ensuring transparency in treaty-based investor-State arbitration. The Commission confirmed that the question of applicability of the legal standard on transparency to existing investment treaties was part of the mandate of the Working Group and a question with a great practical interest, taking account of the high number of treaties already concluded.<sup>3</sup>
3. At its forty-sixth session (Vienna, 8-26 July 2013), the Commission adopted<sup>4</sup> the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration<sup>5</sup> (“Rules on Transparency”) and the UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013).<sup>6</sup> The decision of the Commission adopting the Rules on Transparency included the recommendation that, “subject to any provision in the relevant investment treaties that may require a higher degree of transparency, the Rules on Transparency be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to investment treaties concluded before the date of coming into effect of the Rules on Transparency, to the extent such application is consistent with those investment treaties.”<sup>7</sup> At that session, the Commission agreed by consensus to entrust the Working Group with the task of preparing a convention (“transparency convention” or “convention”) on the application of the Rules on Transparency to existing treaties, taking into account that the aim of the convention was to give those States that wished to make the Rules on Transparency applicable to their existing treaties an efficient mechanism to do so, without creating any expectation that other States would use the mechanism offered by the convention.<sup>8</sup>
4. The most recent compilation of historical references regarding the consideration by the Commission of works of the Working Group can be found in document A/CN.9/WG.II/WP.180, paragraphs 5-8.

## II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its sixtieth session in New York, from 3-7 February 2014. The session was attended by the following States members of the Working Group: Argentina, Armenia, Australia, Austria, Belarus, Brazil, Bulgaria, Canada, China, Colombia, Croatia, Denmark, Ecuador, El Salvador, France, Germany, Greece, Honduras, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Mauritius, Mexico, Nigeria, Pakistan, Panama, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of) and Zambia.
6. The session was attended by observers from the following States: Angola, Burkina Faso, Chile, Cuba, Czech Republic, Egypt, Finland, Guatemala, Holy See, Libya,

<sup>1</sup> *Official records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 314.

<sup>2</sup> *Ibid.*, *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 190.

<sup>3</sup> *Ibid.*, *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 200.

<sup>4</sup> *Ibid.*, *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 128.

<sup>5</sup> *Ibid.*, *Sixty-eighth Session, Supplement No. 17* (A/68/17), Annex I.

<sup>6</sup> *Ibid.*, *Sixty-eighth Session, Supplement No. 17* (A/68/17), Annex II.

<sup>7</sup> *Ibid.*, para. 116.

<sup>8</sup> *Ibid.*, para. 128.

Madagascar, Netherlands, Nicaragua, Norway, Palestine, Peru, Poland, Qatar, Romania, Slovakia, Sweden, and Viet Nam.

7. The session was also attended by observers from the European Union.
8. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: International Centre for Settlement of Investment Disputes (ICSID) and United Nations Educational, Scientific and Cultural Organization (UNESCO);

(b) *Intergovernmental organizations*: African Union (AU), Cooperation Council for the Arab States of the Gulf (GCC), Organization for Economic Cooperation and Development (OECD) and Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Association Suisse de l'Arbitrage (ASA), Asociacion Americana de Derecho Internacional Privado (ASADIP), Association of the Bar of the City of New York (ABCNY), Belgian Center for Arbitration and Mediation (CEPANI), Center for International Environmental Law (CIEL), China International Economic and Trade Arbitration Commission (CIETAC), Construction Industry Arbitration Council (CIAC), German Institution of Arbitration (DIS), Institute of International Commercial Law (IICL), Inter-American Commercial Arbitration Commission (IACAC), International Bar Association (IBA), International Insolvency Institute (III), International Institute for Sustainable Development (IISD), Kuala Lumpur Regional Centre for Arbitration (KLRCA), Miami International Arbitration Society (MIAS), Milan Club of Arbitrators, New York State Bar Association (NYSBA), P.R.I.M.E. Finance Foundation, Pakistan Business Council (PBC), Queen Mary University of London (QMUL), Swedish Arbitration Association (SAA) and Tehran Regional Arbitration Centre (TRAC).

9. The Working Group elected the following officers:

*Chairman*: Mr. Salim Moollan (Mauritius)

*Rapporteur*: Mr. Yeghishe Kirakosyan (Armenia)

10. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.180); (b) note by the Secretariat regarding the preparation of a convention on transparency in treaty-based investor-State arbitration (A/CN.9/WG.II/WP.181).

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of a convention on transparency in treaty-based investor-State arbitration.
5. Organization of future work.
6. Other business.
7. Adoption of the report.

### III. Deliberations and decisions

12. The Working Group resumed its work on agenda item 4 on the basis of the note prepared by the Secretariat (A/CN.9/WG.II/WP.181). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. The Working Group considered agenda items 5 and 6. The deliberations and decisions of the Working Group with respect to those items are reflected in chapters V and VI, respectively.



13. At the closing of its deliberations, the Working Group requested the Secretariat (i) to prepare a draft transparency convention based on the deliberations and decisions of the Working Group, and in that respect, to make the necessary drafting adjustments to ensure consistency of language in the text of the convention; and (ii) to circulate the draft transparency convention to Governments for their comments, with a view to consideration of the convention by the Commission at its forty-seventh session, to be held in New York from 7-25 July 2014.

#### **IV. Preparation of a convention on transparency in treaty-based investor-State arbitration**

14. The Working Group recalled its discussions at its fifty-ninth session (Vienna, 16-20 September 2013) at which time it completed the first reading of the transparency convention.

##### **A. Consideration of the draft text of the convention**

15. The Working Group proceeded to consider the draft text of the convention as set out in paragraph 7 of document A/CN.9/WG.II/WP.181.

###### **1. Preamble**

16. As a preliminary matter, the Working Group recalled its decision at its fifty-ninth session that the mandate given by the Commission to the Working Group (see above, para. 3) would not be included in the preamble of the transparency convention, but rather that language contained in paragraph 6 of document A/CN.9/WG.II/WP.181 would be included for consideration by the Commission in the proposal for the General Assembly resolution recommending the transparency convention (see A/CN.9/794, para. 41).

17. In order to emphasize the understanding that Parties to the transparency convention should have the flexibility to adopt the declarations and reservations under the convention, a proposal was made to add the following language to the preamble: "Acknowledging the importance of a flexible approach under the terms of this Convention in light of the complexity of bilateral investment treaties and the interests of State Parties to such treaties, and emphasizing that the Convention constitutes a cornerstone to strengthening the global impact of investor-State dispute mechanism;". That proposal did not receive support.

18. The Working Group recalled that, at its fifty-ninth session, it had found the preamble acceptable in substance, subject to further consideration of the first two paragraphs. It recalled that it had agreed to consider further whether to retain those paragraphs, delete them, or replace them with a single paragraph recalling the mandate of UNCITRAL (A/CN.9/794, para. 35).

19. It was suggested to delete the first two paragraphs of the preamble, on the basis that those paragraphs did not relate to the purpose and content of the convention, and that deleting them would promote clarity of interpretation. Another suggestion was made to retain the language in the second paragraph of the preamble that addressed the importance of the removal of legal obstacles to the flow of international trade and investment. In response, it was said that the language in the first two paragraphs of the preamble, including the language in relation to the removal of obstacles to the flow of international trade, did little to increase the interpretative value of the preamble.

20. After discussion, it was agreed to delete the first two paragraphs of the preamble as contained in paragraph 7 of document A/CN.9/WG.II/WP.181, in their entirety. With that modification, the Working Group approved the preamble in substance.

###### **2. Draft article 1 — Scope of application**

21. It was clarified in respect of article 1 that, in light of the agreement of the Working Group at its fifty-ninth session to provide for a general provision on scope and a separate provision on the obligations of the Contracting Parties as currently set out in article 3, the

remaining issue for the second reading of the convention in relation to article 1 was whether the word “treaty” or the term “investment treaty” ought to be used to refer to the investment treaties which are the subject of the convention.

*“Investment treaty” or “treaty”*

22. In support of the use of the words “investment treaty”, it was said that in the context of a convention, it was preferable to use a specific term, rather than the more general word “treaty”. In particular, it was said that the word “treaty” was already defined under the Vienna Convention on the Law of Treaties (1969) (the “Vienna Convention”), and that it could lead to confusion if that term was defined differently in the transparency convention. It was further said that the term “investment treaty” provided clear indication as to the type of treaty covered by the Convention.

23. In response, it was said that the term “treaty” was defined in the Rules on Transparency, and that using the same terminology in the Rules and the transparency convention would clarify that both instruments had the same scope of application in respect of the treaties to which they referred.

24. It was confirmed that the term “treaty” as defined in the Rules on Transparency, and “[investment] treaty” as defined in the transparency convention, indeed had the same meaning and that the slight discrepancy in the definitions (as contained in the footnote to article 1 of the Rules, and in article 1(2) of the transparency convention respectively) was a result of the intention to give guidance to users of the Rules, but to have a precise definition in the convention (A/CN.9/794, para.70).

25. A suggestion to move the definition contained in article 1(2) of the transparency convention to a footnote to article 1(1) did not receive support.

26. After discussion, it was agreed to (i) define the term in the transparency convention as “investment treaty”, on the basis that the *travaux préparatoires* record that that was a purely terminological choice and that the definition of “investment treaty” in the convention, and the definition of “treaty” in the first footnote to the Rules on Transparency, had exactly the same meaning and scope; and (ii) amend paragraph (1) to read: “This Convention applies to investor-State arbitration conducted on the basis of an investment treaty.” (see also below, para. 82).

### 3. Draft article 2 — Interpretation

27. The Working Group recalled that it had agreed to consider draft article 2 further, and in particular whether to retain or delete that article (A/CN.9/794, paras. 83-88).

28. After discussion, it was agreed to delete article 2, on the basis that that provision was not necessary and that moreover its content differed from Part III of the Vienna Convention, and consequently could lead to complexity in the interpretation of the transparency convention.

### 4. Draft article 3 — Application of the UNCITRAL Rules on Transparency

*General*

29. Two proposals were introduced in relation to article 3. The first was that the transparency convention apply on a reciprocal basis as between Contracting Parties to the convention, and specifically that in order for the Rules on Transparency to apply, both the respondent Party and the Party of the claimant would have to be Party to the convention and not have made a relevant reservation. The other was that a reservation by the Party of the claimant would not prevent the Rules on Transparency from being applied by a respondent Party which had not made a relevant reservation. Thus the former proposal provided that reservations should only apply under article 3(1)(a) where Contracting Parties to the convention had made the same reservation in respect of a relevant investment treaty, and the latter provided that a reservation, or lack thereof, formulated by the respondent Party would provide the applicable regime for any dispute.

30. By way of concrete example, those diverging proposals could be framed as a policy question, as follows: when Contracting Party A to the transparency convention had

formulated a reservation in relation to a particular investment treaty, but Contracting Party B to the transparency convention had not, whether, when a claimant from Contracting Party A initiated a claim against Contracting Party B, the Rules on Transparency would apply to that dispute.

31. It was agreed that this was an issue of policy which ought to be considered before considering the precise wording of the respective proposals.

32. In addition, the Working Group considered whether, beyond any question of policy, there might be any legal impediments to applying the convention where there was no reciprocity with respect to the relevant reservation.

33. In relation to the policy question, it was said that requiring reciprocity under article 3 would mean that the transparency convention would apply in fewer situations, and consequently could also result in a less broad application of transparency. In response, it was said that that was not necessarily the case. It was recalled that the Working Group had considered at its fifty-ninth session what might happen should an underlying investment treaty contain a higher standard of transparency than the Rules on Transparency, and how that ought to be determined; it was agreed at that session that should a Party to the transparency convention wish to apply a higher standard in an underlying investment treaty, it could formulate a reservation to exclude that treaty from the application of the transparency convention. It was said that without including a requirement of reciprocity in relation to reservations and declarations, in those circumstances, the Rules on Transparency, and not the higher regime provided for in the underlying investment treaty, and agreed bilaterally, might be applied by the respondent Party.

34. In support of a reciprocal approach to reservations and declarations, it was said that when a Contracting Party formulated a reservation to the transparency convention, that reservation should apply not only to that Contracting Party but also to the investors of that Contracting Party, were they to initiate a dispute against a Contracting Party that had not made the same reservation.

35. Another view expressed in support of reciprocity of reservations was that a lack of reciprocity would run counter to Article 21(1) of the Vienna Convention and as such was not desirable. In response, it was said that providing that a reservation would operate only in respect of the Contracting Party making the reservation but not in respect of a Contracting Party that had not made the same reservation did not run counter to Article 21(1) of the Vienna Convention, and that it would not be a legal bar to the transparency convention defining its own scope as one in which reservations need not be reciprocal.

36. A question was raised as to whether, in relation to investment treaties already in existence and hence to which the transparency convention would apply, higher standards of transparency than those contained in the Rules on Transparency did in fact exist. In response, various examples were cited, including of investment treaties that provided for fewer restrictions or constraints than the Rules on Transparency. However, another view was expressed that, particularly given the robust nature of the Rules on Transparency, the number of such treaties would pale in comparison to the number of investment treaties currently in existence and under which no transparency provisions, or lesser transparency provisions, applied. Furthermore, it was said that the examples given provided for modalities that did not necessarily justify a regime of reciprocity.

37. A question was raised as to whether reciprocity was necessary in relation to the different reservations provided for under article 5, and whether the policy issues discussed in relation to article 5(1)(a) would apply with the same force or at all in relation to article 5(1)(b), (c) and (2). Delegations supporting a reciprocal approach indicated that while the policy reasons would be less compelling under other provisions of article 5, clarity might require a consistent approach.

38. It was agreed to address the matter further at a later stage (see below, paras. 97-128).

#### *Paragraph (2)*

39. The Working Group approved the substance of paragraph (2) as contained in paragraph 7 of document A/CN.9/WG.II/WP.181 (see below, paras. 121 and 122).

*Paragraph (3) — Most-favoured-nation clause*

40. The Working Group recalled its consideration at its fifty-ninth session whether a most-favoured-nation clause (“MFN clause”) in an investment treaty could be triggered by a carve-out of certain investment treaties from the transparency convention (A/CN.9/794, para. 118).

41. A view was expressed that paragraph (3), which provided that a claimant could neither avoid nor invoke the provisions of the transparency convention on the basis of an MFN clause, should be deleted, because (i) it was not clear whether, under existing jurisprudence, transparent arbitration would constitute more or less favourable treatment of an investor; (ii) MFN clauses in many investment treaties were framed sufficiently narrowly so as not to apply to the issues covered by the convention in any event; and (iii) including such a provision would not prevent MFN clauses from being invoked when the party attempting to invoke such a clause was from a State or a regional economic integration organization not party to the transparency convention.

42. It was also said in support of deleting paragraph (3) that, despite the clarification in the *travaux préparatoires* that the deliberations of the Working Group should not be interpreted as taking a position on the question of the applicability of MFN clauses to dispute settlement procedures under investment treaties (A/CN.9/794, para. 119), and that the Working Group was not expressing a position on how MFN clauses ought to be interpreted as a matter of international law, including a provision in relation to MFN clauses might give rise to a perception that the Working Group was in fact expressing such a position.

43. A different view was expressed that retaining a provision plainly could not give rise to any broader rule of interpretation, but would be useful in the context of the transparency convention to provide for greater certainty in addressing how an MFN clause should function in relation to investment treaties that were included in its scope. It was further said that from the perspective of an arbitral tribunal, it would be helpful if such a provision were included in the transparency convention in relation to the interpretation of an MFN clause in a particular investment treaty.

44. A proposal was made to replace paragraph (3) with the following language: “This Convention shall not create any obligation under an MFN clause in an investment treaty”. That proposal did not receive support.

45. A separate proposal was made to clarify that paragraph (3) could be replaced with language more clearly indicating that the meaning of such provision was to create a procedural bar to claimants attempting to avoid or invoke the Rules on Transparency by way of an MFN clause, rather than a statement in respect of the interpretation of MFN clauses more generally.

46. After discussion, it was agreed that a provision reflecting the principle in paragraph (3) would be retained in the transparency convention, but that the drafting of that provision would need to be further considered (see below, paras. 88-96, 123 and 124).

*Location*

47. A proposal was made to relocate the provision to a separate article, in order that it would apply equally to article 4. It was said that that issue would be reconsidered further to the discussions of the Working Group on article 4.

**5. Draft article 4 — Declaration on future [investment] treaties**

48. It was noted that article 4 addressed the question of the application of the transparency convention to investment treaties concluded after 1 April 2014 (A/CN.9/794, paras. 53-58, 116-117).

49. A suggestion was made to delete that article on the basis that the main mandate given by the Commission (see above, para. 3) related to existing investment treaties. In addition, it was said that article 4 raised an issue of legal impossibility insofar as the provisions of an earlier investment treaty could not modify the provisions of an investment treaty concluded later in time, as article 4 purported to do (see A/CN.9/WG.II/WP.181, para. 30). In response, it was said that if two Contracting Parties agreed, after the conclusion of the relevant

investment treaty, to apply the Rules on Transparency to that treaty via the transparency convention, the Rules on Transparency would so apply. It was said that while that would be a narrower application of article 4 than that initially contemplated, it might still be worth retaining the article for that purpose. It was further said that such a mechanism could create a useful tool for those contracting Parties which may change their policy as regards increased transparency in the future.

50. After discussion, there was consensus that article 4 ought to be deleted and delegations that had requested to consult further on that matter were invited to revert to the Working Group at a later stage of its deliberations (see below, paras. 83-86).

## 6. Draft article 5 — Reservations

### *Paragraph (1)*

51. The Working Group agreed to consider paragraph (1) alongside a consideration of article 3(1) at a later stage of its deliberations (see below, paras. 97-128).

### *Paragraph (2)*

52. A proposal was made to replace paragraph (2) as follows: “2. In the event of amendment to the UNCITRAL Rules on Transparency, a Contracting Party may, within six months of the adoption of such amendment, make a reservation that such revised version of those Rules shall not apply under this Convention. 2(bis). In any arbitration in which the UNCITRAL Rules on Transparency apply pursuant to articles 3(1) or 4, the tribunal shall apply the most recent version of the Rules on Transparency as to which (a) in arbitrations falling under article 3(1)(a) or article 4(a), neither the respondent Contracting Party nor the Contracting Party of the claimant has made a reservation pursuant to article 5(2); and (b) in arbitrations falling under article 3(1)(b) or article 4(b), the respondent Contracting Party has not made a reservation pursuant to article 5(2) and as to which the claimant consents.”

53. In support of that proposal, it was said that it clarified the version of the Rules of Transparency that ought to apply in the event there were successive revisions to the Rules on Transparency; namely, under that proposal, it was clear that the most recent version of the Rules to which both Contracting Parties had not formulated a reservation would apply, or in relation to a unilateral offer, the most recent version of the Rules agreed to by the respondent and to which the claimant had agreed.

54. After discussion, it was agreed to consider further the policy issue of whether to include a requirement for reciprocity under article 5(2). Further, it was agreed that in any event the structural nature of the proposal set out in paragraph 52 above should be retained as a useful basis for further drafting insofar as it clearly set out the effects of a reservation as to an amendment to the Rules on Transparency (see below, paras. 97-128).

### *Paragraph (3)*

55. The Working Group approved the substance of paragraph (3) as contained in paragraph 7 of document A/CN.9/WG.II/WP.181 (see also below, paras. 114 and 128).

## 7. Draft article 6 — Declarations and reservations

### *Paragraph (1)*

56. The Working Group approved the substance of paragraph (1) as contained in paragraph 7 of document A/CN.9/WG.II/WP.181.

### *Paragraph (2)*

57. The Working Group approved the substance of paragraph (2) as contained in paragraph 7 of document A/CN.9/WG.II/WP.181.

### *Paragraph (3)*

58. The Working Group approved the substance of paragraph (3) as contained in paragraph 7 of document A/CN.9/WG.II/WP.181.

*Paragraph (4)*

59. A suggestion was made to insert the following language at the beginning of paragraph (4): “Except for reservations under article 5(2), which shall take effect immediately upon receipt by the depositary, a declaration, reservation, or modification of a declaration or reservation of which the depositary receives ...”. It was said that reservations under article 5(2) ought to take effect immediately, so that an amendment to the Rules that a Contracting Party did not wish to implement would never apply to that Contracting Party.

60. A view was expressed that the application of reservations ought to be immediate. That view was not supported.

61. After discussion, it was agreed to adopt the proposal as set out in paragraph 59 above, but to remove the words “or modification of a declaration or reservation” contained therein, as repetitive with article 6(6). It was further agreed to add the words “for that Contracting Party” after the phrase “entry into force of the Convention”. Consequently, the revised text of article 6(4) as agreed read as follows: “Except for reservations under article 5(2), which shall take effect immediately upon receipt by the depositary, a declaration or reservation of which the depositary receives formal notification after the entry into force of the convention for that Contracting Party takes effect on the first day of the month following the expiration of twelve months after the date of its receipt by the depositary.”

*Paragraph (5)*

62. The Working Group approved the substance of paragraph (5) as contained in paragraph 7 of document A/CN.9/WG.II/WP.181.

*Paragraph (6)*

63. A proposal was made to replace paragraph (6) as follows: “Notwithstanding paragraph 3, if, after this Convention has entered into force for a Contracting Party, that Party (a) makes a declaration under article 4; (b) withdraws or modifies a reservation made under article 5(1)(a) or (b) so as to apply article 3(1)(a) or (b) to arbitration under an additional investment treaty or under additional arbitral rules or procedures; (c) withdraws a reservation made under article 5 (1)(c) or (2); or (d) withdraws or modifies a declaration made under article 9 so as to apply articles 3 or 4 to an additional territorial unit, or to arbitration under an additional investment treaty or additional arbitral rules or procedures; such declaration, withdrawal, or modification is to take effect on the first day of the month following the expiration of three months after the date of receipt of the notification by the depositary. Any other modification or withdrawal is to take effect on the first day of the month following the expiration of twelve months after the date of receipt of the notification by the depositary.”

64. It was said in support of that proposal that it served to make mechanical the principle set out in article 6(6), as contained in paragraph 7 of document A/CN.9/WG.II/WP.181 — namely, that there ought to be a shorter period of time for a withdrawal or modification that provided for greater transparency to take effect, and simultaneously a 12-month period for modifications or withdrawals that reduced transparency to take effect, as an anti-abuse measure.

65. In response, it was said that that proposal raised a practical concern as to whether the depositary function would be able to process such a variegated provision, even one that did not provide for a qualitative judgement to be made per se. The question was raised whether that proposal could adequately address a situation in which a withdrawal or modification both expanded the scope of transparency (e.g., by removing an investment treaty from a reservation under article 5(1)(a)), and contracted it (e.g., by at the same time formulating a reservation in respect of that treaty under article 5(1)(b)). It was said in response that that situation would not arise as the wording of article 5(1)(b) could not be applied on a treaty-by-treaty basis.

66. A view was expressed that in light of the practical difficulties raised by the text of the proposal set out in paragraph 63 above, and the possible burden it would impose on the depositary, a much simpler and more desirable option might be to have a single time period applicable to both types of modifications and withdrawals. It was said in support of that

suggestion that simplicity and workability was advantageous, in particular given the direct implications of the convention on relevant arbitrations.

67. After discussion, a revised proposal was made as follows: “6. If, after this Convention has entered into force for a Contracting Party, that Party (a) withdraws or modifies a reservation made under article 5(1) so as to apply article 3(1) to arbitration under an additional investment treaty or to arbitration under additional arbitral rules or procedures; or (b) withdraws a reservation made under article 5(2); such withdrawal or modification is to take effect on the first day of the month following the expiration of three months after the date of receipt of the notification by the depositary. Any other reservation, modification, or withdrawal is to take effect on the first day of the month following the expiration of twelve months after the date of receipt of the notification by the depositary.”

68. It was said that that proposal provided for greater simplicity, while retaining the principle of differentiated timing in relation to different types of withdrawals and modifications.

69. After discussion, the Working Group adopted the proposal set out in paragraph 67 above, subject to any drafting adjustments that might be required for the purposes of ensuring consistency with other provisions in the convention (see below, paras. 134(a) and 136).

#### **8. Draft article 7 — Depositary**

70. The Working Group approved the substance of article 7, as contained in paragraph 7 of document A/CN.9/WG.II/WP.181.

#### **9. Draft article 8 — Signature, ratification, acceptance, approval, accession**

71. The Working Group approved the substance of article 8, as contained in paragraph 7 of document A/CN.9/WG.II/WP.181 (for discussion on article 8(1), see below para. 137).

#### **10. Draft article 9 — Effect in territorial units**

72. A proposal was made to delete article 9 on the basis that such a provision only related to exceptional circumstances and moreover addressed matters beyond the scope of the transparency convention. It was said that States had developed their own practices with regard to the territorial application of treaties, and that such practice was more appropriately determined by national practice and public international law principles.

73. After discussion, the Working Group agreed to delete article 9.

#### **11. Draft article 10 — Participation by regional economic integration organizations**

74. The Working Group approved the substance of article 10, as contained in paragraph 7 of document A/CN.9/WG.II/WP.181, subject to further consideration of whether article 10(1) should be deleted. The Working Group agreed to consider that drafting matter at a later stage of its deliberations (see below, paras. 129-133).

#### **12. Draft article 11 — Entry into force**

75. The Working Group approved the substance of article 11, as contained in paragraph 7 of document A/CN.9/WG.II/WP.181.

#### **13. Draft article 12 — Time of application**

76. It was proposed to include in article 12 a reference to the withdrawal or modification of a declaration or reservation, on the basis that withdrawals or modifications should not affect arbitrations already commenced at the time of that withdrawal or modification. That proposal received support, and consequently it was agreed to amend article 12 such that it would read as follows: “This Convention and any declaration, reservation, or any modification to or withdrawal of a declaration or reservation, apply only to arbitrations that have been commenced after the date when the Convention, declaration, reservation, or any modification to or withdrawal of a declaration or reservation, enters into force or takes effect in respect of each relevant Contracting Party.”

77. It was noted that the words “each relevant Contracting Party” at the end of that provision were intended to make it clear that the article referred to the time when the convention would enter into force in respect of the Contracting Party in question, and not when the convention would enter into force generally (A/CN.9/784, para. 18).

#### **14. Draft article 13 — Revision and amendment**

78. A suggestion was made that the procedure in article 13 for revising or amending the convention should be further considered in order to ensure a comprehensive procedure for adopting amendments to the convention. The Working Group agreed to discuss that matter further (see below paras. 139-147).

#### **15. Draft article 14 — Denunciation of this Convention**

79. A suggestion was made that, for consistency with the wording used elsewhere in the text of the convention, paragraph (1) should provide that a denunciation “shall take effect” (instead of “takes effect”), and paragraph (2) should provide that the Convention “shall continue to apply” (instead of “will continue to apply”). It was also proposed to change the term “one year” to “twelve months” to maintain consistency with other provisions in the transparency convention.

80. The Working Group took note of the drafting suggestions and mandated the Secretariat to modify the drafting as necessary. In all other respects the Working Group approved the substance of article 14, as contained in paragraph 7 of document A/CN.9/WG.II/WP.181.

### **B. Consideration of remaining open issues**

81. The Working Group proceeded to address the remaining outstanding matters in its second reading of the transparency convention.

#### **1. Article 1(2)**

82. Further to its discussions on article 1 (see above, paras. 21-26), the Working Group agreed to retain the text of article 1(2) as contained in paragraph 7 of document A/CN.9/WG.II/WP.181 without amendment.

#### **2. Article 4**

83. Following its discussion on article 4 (see above, paras. 48-50), the Working Group considered that article further, and in particular, whether it ought to be deleted.

84. A proposal was made to retain article 4 but to replace it with the following language: “A Contracting Party may declare that the UNCITRAL Transparency Rules shall apply to any non-UNCITRAL arbitration proceedings commenced under an investment treaty concluded after 1 April 2014, to the same extent to which the UNCITRAL Transparency Rules are applicable under the UNCITRAL Arbitration Rules.” It was said that that language would permit an application of the Rules on Transparency to arbitrations arising under future investment treaties that referred to arbitration rules other than the UNCITRAL Arbitration Rules. That proposal did not receive support.

85. It was furthermore said that the transparency convention was intended to address treaties existing prior to 1 April 2014, and that States or regional economic integration organizations concluding treaties after that date would be free to agree to apply the Rules on Transparency in conjunction with other arbitral rules or in ad hoc proceedings.

86. After discussion, it was agreed to delete article 4 in its entirety.

#### *Effect of a renegotiation of existing treaties*

87. Another question was raised in relation to whether, if Contracting Parties to the transparency convention also parties to an underlying existing investment treaty decided to reopen negotiations in relation to that existing investment treaty, in contravention of provisions of the transparency convention, that would amount to an amendment thereto, or have different consequences, in light of the later in time rule. Delegations were invited to



reflect further on that question and to raise the issue again if it was felt that that question raised any concern which ought to be dealt with by appropriate wording in the convention.

### 3. Article 3, paragraph (3)

88. The Working Group recalled its decision to retain a provision regarding MFN clauses, subject to further consideration of the drafting (see above, para. 46).

89. The Working Group considered the following drafting proposal in that respect: “A claimant may not seek to alter the applicability or non-applicability of the Rules on Transparency under this Convention by invoking a most-favoured-nation clause.”

90. Various drafting comments were made in relation to that proposal. It was suggested to simplify the provision as follows: “A claimant cannot invoke a most-favoured-nation clause to alter the application or non-application of the Rules on Transparency under this Convention.”

91. In response to the concern that the provision would, under the proposals set out above, be addressed to claimants, not themselves party to the transparency convention, it was said that investment treaties themselves bestowed legal rights and obligations on nationals of Contracting Parties. A specific proposal to address that concern by adding the following opening words to the revised draft proposal contained in paragraph 89 above: “Each Contracting Party agrees that”, received support.

92. It was said in relation to the proposal set out in paragraph 89 above, that the inclusion of the words “may not seek to alter” in fact served two important purposes in relation to how MFN clauses apply to procedural issues generally, and ought to be retained. First, it was said that those words ensured that the text avoided taking a position on the substance on possible application of the scope of MFN clauses in general; and second, if the words “cannot alter” were included instead, then it would suggest that the opposite would be true save for that provision.

93. Another suggestion was made to provide for a wider application of the provision in order to capture not only MFN clauses, but also other treaty provisions that disputing parties might use to alter the application of the Rules on Transparency, as well as the possibility that now or in the future, respondents could also invoke MFN clauses. That proposal read as follows: “The parties to the dispute shall not seek to alter the application or non-application of the Rules on Transparency under the Convention by invoking the provision of the investment treaty”. That proposal did not receive support.

94. After discussion, a modified proposal in relation to paragraph (3) was introduced as follows: “Each Contracting Party to this Convention agrees that a claimant may not invoke a most-favoured-nation provision to seek to alter the application or non-application of the Rules on Transparency under this Convention.”

95. Views were expressed that that proposal did not reflect the possibility that investment treaty arbitration might develop such that respondents would also be able to invoke MFN clauses.

96. After discussion, it was agreed to adopt the modified proposal set out in paragraph 94 above, subject to a mandate to the Secretariat to adjust the drafting as necessary (see also below, paras. 123 and 124).

### 4. Articles 3 and 5

#### *Reciprocity in relation to article 5(1)(a)*

97. The Working Group considered further the matter of reciprocity of reservations as set out above in paragraphs 29 to 38. After discussion, and recalling the reasons set out in its discussions and recorded above at paragraphs 34 to 36, the Working Group agreed to adopt a requirement of reciprocity in relation to the reservations falling under article 5(1)(a).

98. It was said that in relation to article 5(1)(b), (c) and (2), taking into account the different policy considerations, there should be reciprocal application of such reservations. However, it was said that some of the underlying policy concerns in relation to article 5(1)(a), particularly in relation to investment treaties that articulated a higher degree of transparency

(see above para. 33), did not apply in relation to the remainder of article 5. Another view was expressed that because those provisions did not raise the same policy concerns as the provisions of article 5(1)(a), they ought to be treated differently.

99. The Working Group proceeded to consider a concrete drafting proposal to implement the agreement for reciprocity under article 5(1)(a), and a possible reciprocal approach in the remainder of article 5, as follows. The proposal included article 3(1) in light of the linkage between those two articles: “Article 3. “1. Each Contracting Party to this Convention agrees that the UNCITRAL Rules on Transparency, as they may be revised from time to time, shall apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules conducted pursuant to an investment treaty concluded before 1 April 2014, in which the respondent is a Contracting Party that has not made a relevant reservation under article 5(1), and either (a) the claimant is of a Contracting Party that also has not made a relevant reservation under article 5(1), or (b) the claimant agrees to the application of the UNCITRAL Rules on Transparency.” Article 5. “1. A Contracting Party may declare that: (a) a specific investment treaty, identified by title, name of Parties to that investment treaty, and date that investment treaty was concluded, shall not be subject to this Convention; (b) article 3(1)(a) and/or (b) shall not apply to arbitrations conducted using certain sets of arbitration rules or procedures other than the UNCITRAL Arbitration Rules; (c) article 3(1)(b) will not apply.”

100. It was suggested as a matter of drafting to relocate the phrase, in article 3(1), “conducted pursuant to an investment treaty”, after the words “any investor-State arbitration”. That proposal received support.

101. Another drafting proposal was made to remove the phrase “Each Contracting Party to this Convention agrees” from the beginning of article 3(1), to reduce repetition in that article. A separate proposal was made to move that phrase so that it would constitute a chapeau for the entire article.

102. A concern was raised that the phrase “relevant reservation” in paragraph (1) could lead to confusion or be misinterpreted, in light of the different types of reservations enumerated in article 5 and the applicability of those reservations to the obligations in article 3. By way of further explanation, it was said that by addressing reservations that applied to situations under article 3(1)(a) (reciprocal obligations) as well as under article 3(1)(b) (unilateral offers), article 5(1)(b) could lead to very complex determinations by an arbitral tribunal as to whether a reservation applied.

103. In response, a view was expressed that the phrase “relevant reservation” was clear, and that while it would require interpretation by the arbitral tribunal in respect of each dispute, a tribunal could be relied upon to determine whether a reservation applied in a particular case because it related to a particular treaty under which the arbitration was being conducted, a particular set of arbitration rules or a particular version of the Rules on Transparency. In support of that approach, it was said that retaining a simple draft was desirable.

104. Two proposals were made to address the concern set out in paragraph 102 above. The first proposal was to remove reference to reservations in article 3, but to ensure that article 5 clearly expressed the operative effect of a reservation.

105. The second proposal would: (i) replace the phrase in the last line of the chapeau of article 3(1), after the words “relevant reservation”, with the phrase “under articles 5(1)(a) or (b), and either”; (ii) in article 3(1)(a), replace “5(1)” with “5(1)(a) or (b)”; and (iii) insert at the beginning of article 3(1)(b) the text “The respondent Contracting Party has not made a reservation under article 5(1)(c) and”.

*Reciprocity in relation to article 5(1)(b) and (2)*

106. Following consideration of the second proposal set out in paragraph 105 above, the Working Group considered further the issue of whether article 5(1)(b), (c) and (2) ought to require reciprocity or whether the reservation of the respondent Contracting Party ought to be determinative in those instances.

107. In relation to article 5(1)(b), it was reiterated that there was no clear policy reason why reciprocity of reservations ought to exist as between Contracting Parties which had reserved from the application of the transparency convention certain sets of arbitration rules other

than the UNCITRAL Arbitration Rules. It was also said that requiring reciprocity in that respect would add significantly to the complexity of determining whether the Rules on Transparency would apply in a specific instance.

108. A different view was expressed that a lack of reciprocity would contravene the provisions of the Vienna Convention (see above, para. 35), and that the transparency convention should not create a precedent in that respect. It was said that it was an established principle of public international law and treaty relations that a reservation that was formulated should apply to modify obligations in a convention to the same extent for another Party in its relations with the reserving Party. It was also said that grouping reservations into different categories — reciprocity in relation to article 5(1)(a) and non-reciprocity in relation to article 5(1)(b) and (c) — might create an imbalanced regime that could deter States from joining the convention.

109. In response, it was said that the Vienna Convention did not provide any impediment to drafting a convention that expressed distinct legal outcomes. It was furthermore said by way of example, that it was standard to include non-reciprocal obligations in investment treaties.

110. In relation to article 5(1)(c), it was agreed that as that provision provided for the reservation from the option to make a unilateral offer to arbitrate on transparent terms, the only relevant reservation would in any event be that of the respondent Contracting Party.

*Modified draft proposal for articles 3 and 5 (“modified draft proposal”)*

111. A suggestion was made to seek a compromise by defining the scope of application of the convention by reference to the reservations in article 5, in order to set out clearly when the Rules on Transparency would apply under the transparency convention.

112. Consequently a modified draft proposal was introduced in relation to articles 3 and 5, in their entirety.

113. Article 3 of the modified draft proposal read as follows: “1. The UNCITRAL Rules on Transparency, as they may be revised from time to time, shall apply to any investor-State arbitration conducted pursuant to an investment treaty concluded before 1 April 2014, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Contracting Party that has not made a relevant reservation under article 5(1)(a) or (b), and either (a) the claimant is of a Contracting Party that also has not made a relevant reservation under article 5(1)(a), or (b) the respondent Contracting Party has not made a reservation under article 5(1)(c) and the claimant agrees to the application of the UNCITRAL Rules on Transparency. 1bis. In any arbitration in which the UNCITRAL Rules on Transparency apply pursuant to article 3(1), the tribunal shall apply the most recent version of the Rules on Transparency as to which the respondent Contracting Party has not made a reservation pursuant to article 5(2). 2. The final sentence of article 1(7) of the UNCITRAL Rules on Transparency shall not apply to arbitrations arising under investment treaties falling under paragraph 1(a). 3. Each Contracting Party to this Convention agrees that a claimant may not invoke an MFN provision to seek to alter the application or non-application of the Rules on Transparency under this Convention.”

114. Article 5 of the modified draft proposal read as follows: “1. A Contracting Party may declare that: (a) a specific investment treaty, identified by title, name of Parties to that investment treaty, and date that investment treaty was concluded, shall not be subject to this Convention; (b) article 3(1) shall not apply to ad hoc arbitrations or arbitrations conducted using certain sets of arbitration rules or procedures other than the UNCITRAL Arbitration Rules in which it is a respondent; (c) article 3(1)(b) will not apply. 2. In the event of amendment to the UNCITRAL Rules on Transparency, a Contracting Party may, within six months of the adoption of such amendment, make a reservation with respect to that revised version of those Rules. 3. No reservations are permitted to this Convention other than as provided in this article.”

115. Support was expressed for that text as set out in paragraphs 113 and 114 above, and after discussion, consensus was recorded that the modified draft proposal was acceptable in relation to articles 3 and 5, subject to any drafting modifications that may be proposed.

116. After discussion, various drafting proposals were made in relation to the modified draft proposal, including the following proposal in relation to article 3(1) (“the second modified proposal”): “1. The UNCITRAL Rules on Transparency, as they may be revised from time to time, shall apply to any investor-State arbitration conducted pursuant to an investment treaty concluded before 1 April 2014, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Contracting Party that has not made a relevant reservation under article 5(1)(a) or (b), and the claimant is of a Contracting Party that has not made a relevant reservation under article 5(1)(a). 2. The UNCITRAL Rules on Transparency, as they may be revised from time to time, shall also apply to any investor-State arbitration conducted pursuant to an investment treaty concluded before 1 April 2014, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Contracting Party that has not made a relevant reservation under article 5(1), (a), (b) or (c), and the claimant agrees to the application of the UNCITRAL Rules on Transparency.”

117. It was said by way of further explanation that that second modified proposal separated the mechanism whereby both Contracting Parties had agreed to apply the transparency convention in respect of a particular investment treaty into paragraph (1), and a unilateral offer on the other hand, into a separate paragraph (2).

118. The second modified proposal received support.

119. A suggestion to make explicit the understanding that paragraph (2) required the State of the claimant not to be a party to the transparency convention, or to have formulated a relevant reservation, was not supported. However, it was suggested that by splitting article 3(1) into two paragraphs, the word “or”, which had separated the subparagraphs (a) and (b) of article 3(1), and indicated that the second limb of that provision was only applicable if the first was not, no longer existed to clarify the disjunctive situation arising under those subparagraphs. Consequently a proposal was made to include at the beginning of paragraph (2) of that proposal the words “Where they do not apply pursuant to 3(1)”, and to delete the word “also” in that paragraph.

120. After discussion, the proposal set out in paragraph 116 above, with the modification in paragraph 119 above, was accepted.

#### *Application of article 1(7) of the Rules on Transparency*

121. The Working Group had regard to the content of paragraph (2) as contained above in paragraph 113, which would become paragraph (3) under the second modified proposal. A question was raised as to whether that principle — the disapplication of the final sentence article 1(7) of the Rules on Transparency to arbitrations under paragraph (1) of the second modified proposal, would also apply to paragraph (2). It was agreed that it would not, because paragraph (2) provided for a unilateral offer by a respondent Contracting Party to arbitrate transparently, and consequently the Rules on Transparency would apply by agreement of the disputing parties as contemplated by article 1(2)(a) of the Rules on Transparency so that article 1(7) of the Rules on Transparency would not come in the way of their application.

122. Consequently, it was agreed to retain the text of paragraph (2) of article 3, as set out above in paragraph 113.

#### *MFN clauses*

123. The Working Group had regard to the content of paragraph (3) as contained above in paragraph 113, which would become paragraph (4) under the second modified proposal. A concern was reiterated that framing that provision in terms of the claimant’s inability to invoke an MFN clause said nothing about the possibility for a respondent or a third person to invoke an MFN clause (see also above para. 93). The Working Group agreed to retain the provision as contained in paragraph 113, on the basis that the only risk identified by the Working Group concerned the potential use of an MFN clause by claimants. It was reiterated that the Working Group could not, and did not purport to, make any statement or take any position as to the applicability or otherwise of MFN clauses to any given situation, but was merely providing for a procedural bar to prevent a claimant from invoking an MFN provision to seek to alter the application or non-application of the Rules on Transparency under this convention.

124. Consequently, it was agreed to retain the text of the modified draft proposal (as set out above in para. 113).

#### *Article 5*

125. The Working Group had regard to the content of article 5 as contained in the modified draft proposal (as set out above in para. 114).

126. Several proposed drafting changes were suggested in relation to that article. First, in relation to article 5(1)(b), it was suggested to adopt the language in paragraph 7 of document A/CN.9/WG.II/WP.181, such that that subparagraph would read as follows: “(b) article 3(1) shall not apply to arbitrations conducted using certain sets of arbitration rules or procedures other than the UNCITRAL Arbitration Rules in which it is a respondent;”. It was clarified that the word “certain” in that provision was intended to mean “all or some”. It was also noted that, as article 3(1) had been split into two paragraphs, a consequential amendment was required in article 5(1)(b) to refer to both paragraphs (1) and (2) of article 3. Those suggestions were accepted, subject to any minor modifications to be made by the Secretariat for the purposes of drafting clarity.

127. Third, it was proposed to reintroduce the words “in arbitrations in which it is a respondent” to the end of article 5(1)(c). It was said that while that wording might not be strictly necessary, given the logical implication of a reservation in respect of a unilateral offer, such wording would promote clarity of drafting. After discussion, that modification was agreed.

128. Consequently the draft of article 5 as contained in the modified draft proposal was agreed, with the modifications set out in paragraphs 126 and 127 above.

### **5. Article 10(1)**

129. Further to its previous discussions in relation to article 10 (see above, para. 74), the Working Group considered that if the word “State” were to be deleted from paragraph (1), and bearing in mind the drafting suggestion to delete the word “Contracting” where it appeared in the convention before the word “Parties” (see below, para. 135), article 10(1) would read: “Any reference to a ‘Party’ or ‘Parties’ in this Convention applies equally to a regional economic integration organization when the context so requires”.

130. It was said that as “Parties” are defined as being both States and regional economic integration organizations in article 8(1), article 10(1) had become redundant and ought to be deleted. In addition, it was said that the words “when the context so requires”, introduced an element of ambiguity throughout the draft.

131. A concern was raised that if article 10(1) were not to be deleted, the determination of the “context so requiring” in operational provisions of the convention such as in article 3, could lead to complexity. For example, when a State and a regional economic integration organization were both party to an investment treaty, it would not necessarily be clear whether a claimant from a “Party” could be from one or both of those entities under the transparency convention.

132. After discussion, a compromise proposal was suggested on the basis that the discussions appeared to relate to a single existing investment treaty to which a regional economic integration organization was a party — namely, the Energy Charter Treaty — and as such addressed a very limited and narrow set of circumstances. It was said that on that basis, a solution to replace in article 3(1), the words “a claimant is of a Party that has not made a relevant reservation” with the words “a claimant is of a State that is a Party that has not made a relevant reservation”, and to delete article 10(1) as redundant, would be a solution.

133. That proposal received support. One delegation noted that although it would accept that proposal, it did so on the basis of achieving compromise and continued to have reservations about the substance of that solution. After discussion, that proposal was agreed, with the caveat that if after further examination it appeared that the text created difficulties in other circumstances outside the Energy Charter Treaty, that solution might need to be reconsidered.

## C. Comments in relation to treaty practices

134. The Working Group took note of the following comments made by the Secretariat on the drafting of certain provisions of the transparency convention:

(a) Article 6(6): as a matter of simplification, the withdrawal of reservations under the first sentence of the revised proposal of article 6(6), as contained above in paragraph 67 could take effect immediately, instead of after a three-month period;

(b) Article 8(1): the words “that is a party to an investment treaty”, as they appeared in article 8(1) should be deleted, as they were not necessary and would put a burden of the depository to check whether a State or regional economic integration organization was indeed party to such investment treaty. With that modification, article 8(1) would read as follows: “This Convention is open until [date] for signature by (a) any State, or (b) a regional economic integration organization constituted by sovereign States.”;

(c) The Working Group was further informed of the treaty practice to develop more detailed provisions on revision and amendment of conventions than that contained in article 13;

(d) As a matter of drafting, the Working Group agreed that the Secretariat should use the word “shall” in a consistent manner where appropriate in the text of the convention.

135. As a more general drafting matter, it was suggested to delete the word “Contracting” where it appears in the convention before the word “Parties”; it was further suggested to delete the words “on the first day of the month following the expiration of” where those words appear in articles 6, 11 and 14 of the convention. After discussion, those suggestions were agreed.

### 1. Article 6(6)

136. After discussion, it was agreed that withdrawal of reservations would take effect immediately following deposit, rather than after a three-month period.

### 2. Article 8(1)

137. The Working Group agreed to the deletion of the words “that is a party to an investment treaty” where it appeared in subparagraph (a) of article 8(1), and to retain those words where they appeared in subparagraph (b) of that article, for the reason that regional economic integration organizations ought to be party to such investment treaties to in turn become party to the transparency convention. In addition, the Working Group agreed that a provision should be included in the text of the convention providing that regional economic integration organization should declare, at the time of adoption of or accession to the convention that it is a party to an investment treaty.

### 3. Article 13

138. Following its discussion in relation to article 13 (see above, para. 78), the Working Group considered a proposal to redraft that article as follows: “1. Any Contracting Party may propose an amendment to the present Convention and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Contracting Parties to this Convention with a request that they indicate whether they favour a conference of Contracting Parties for the purpose of considering and voting upon the proposal. In the event that within [four] months from the date of such communication at least one third of the Contracting Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. 2. The conference of Contracting Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Contracting Parties present and voting at the conference. 3. An adopted amendment shall be submitted by the Secretary-General of the United Nations to all the Contracting Parties for acceptance. 4. An adopted amendment enters into force six months after the date of deposit of the third instrument of acceptance. 5. When an amendment enters into force, it shall be binding on those Contracting Parties which have accepted it, other

Contracting Parties still being bound by the provisions of this Convention and any earlier amendment which they have accepted. 5bis. When a State or a regional economic integration organization ratifies, accepts, approves or accedes to an amendment, that has already entered into force, the amendment enters into force in respect of that State or that regional economic integration organization, six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. 6. Any State or regional economic integration organization which becomes a Contracting Party to the Convention after the entry into force of the amendment shall be considered as a Contracting Party to the Convention as amended.”

139. It was said that the purpose of that revised text was to provide a clear and detailed procedure in the event of amendment of the convention. It was explained that paragraph (1) was modelled after Article 47(1) of the Convention on the Rights of Persons with Disabilities and Article 44(1) of the International Convention for the Protection of All Persons from Enforced Disappearance. It was further explained that: (i) paragraph (1) aimed at clarifying that a proposal of an amendment is to be filed individually by each Contracting Party; and (ii) the second sentence of paragraph (1) was based on Article 40(2) of the Vienna Convention.

140. In relation to paragraph (2), it was said that it aimed at specifying the number of Contracting Parties necessary for the adoption of the amendment and that the proposed text emphasized consensus in accordance with the UNCITRAL practice. It was noted that paragraph (4) followed article 11(1) of the transparency convention and that paragraph (5) was based on Article 40(4) of the Vienna Convention. It was further noted that paragraph (6) corresponded to article 13(2) of the transparency convention, taking also into account Article 40(5) of the Vienna Convention.

141. After discussion, the Working Group agreed to consider the draft proposal as the basis of replacement for article 13.

142. In relation to the drafting of that proposal, it was agreed to replace: (i) the word “agreement” where it appeared in the second sentence of paragraph (2) of that proposal, by the word “consensus”; (ii) the word “acceptance” where it appeared in the draft proposal by the words “ratification, acceptance or approval”; and (iii) the word “accepted” where it appeared in paragraph (5) by the words “expressed consent to be bound by”.

143. In relation to the substance of that proposal, it was suggested to delete the words “other Contracting Parties still being bound by the provisions of this Convention and any earlier amendment which they have accepted” in paragraph (5), on the basis that that matter was dealt with under the Vienna Convention in a more nuanced fashion. That proposal was agreed.

144. A further suggestion was made to delete paragraph (6) of that proposal; that suggestion did not receive support. A separate proposal to provide under paragraph (6) that Parties acceding to the convention after an amendment thereto should be given the option to adopt the convention with or without the amendment, was also not supported.

145. A proposal to revise the title of article 13, to read simply “Amendment”, in order better to reflect the substance of the provision, was accepted.

146. After discussion, it was agreed to retain the text of the proposal set out in paragraph 138 above, as modified by paragraphs 142, 143 and 145 above.

## V. Organization of future work

147. In relation to future work in the field of dispute settlement to be considered by the Commission at its forty-seventh session, the Working Group reiterated its understanding that it would commence work on the revision of the Notes on Organizing Arbitral Proceedings at its sixty-first session.

## VI. Other business

148. In commemoration of the sixtieth session of the Working Group, and having regard to the significance of the work of that Working Group since its inception, Bryan Hymel, the American operatic tenor, sang the aria “*Ah! Lève-toi Soleil*” from the opera “*Roméo et Juliette*” by Charles-François Gounod.



**D. Note by the Secretariat on settlement of commercial disputes:  
Draft convention on transparency in treaty-based  
investor-State arbitration**

(A/CN.9/WG.II/WP.181)

[Original: English]

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## I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), with respect to future work in the field of settlement of commercial disputes, the Commission entrusted its Working Group II with the task of preparing a legal standard on transparency in treaty-based investor-State arbitration.<sup>1</sup> At its forty-fourth session (Vienna, 26 June-8 July 2011), the Commission confirmed that the question of applicability of the rules on transparency under preparation to investment treaties concluded before the date of adoption of such rules (“existing investment treaties”) was part of the mandate of the Working Group and a question of great practical interest, taking account of the high number of investment treaties currently in existence.<sup>2</sup> In that context, the Working Group discussed the options of making the rules on transparency applicable to existing investment treaties either by way of a convention, whereby States could express consent to apply the rules on transparency to arbitrations arising under their existing investment treaties, or by a recommendation urging States to make the rules applicable in the context of treaty-based investor-State dispute settlement. The possibility of making the rules on transparency applicable to existing investment treaties by joint interpretative declaration pursuant to article 31(3)(a) of the Vienna Convention on the Law of Treaties (1969) (the “Vienna Convention”), or by an amendment or modification of a relevant treaty pursuant to articles 39-41 of the Vienna Convention, was also considered by the Working Group.<sup>3</sup>

2. At its forty-sixth session (Vienna, 8-26 July 2013), the Commission adopted the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Rules on Transparency”), together with the UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013). The Commission, in its decision adopting the Rules on Transparency, recommended, *inter alia*, “that, subject to any provision in the relevant investment treaties that may require a higher degree of transparency, the Rules on

<sup>1</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 190.

<sup>2</sup> *Ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 200. For an online compilation of all investment treaties, see the database of the United Nations Conference on Trade and Development (UNCTAD), available on 27 November 2013 at [www.unctadxi.org/templates/DocSearch\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch___779.aspx).

<sup>3</sup> References to the reports of the Working Group where application of the Rules on Transparency to existing investment treaties was discussed: A/CN.9/712, paras. 85-94; A/CN.9/717, paras. 42-46; A/CN.9/736, paras. 134 and 135; A/CN.9/760, para. 141; A/CN.9/765, para. 14. Notes by the Secretariat on the matter: A/CN.9/WG.II/WP.162, paras. 22-40; A/CN.9/WG.II/WP.166/Add.1; A/CN.9/WG.II/WP.169/Add.1; A/CN.9/WG.II/WP.176/Add.1.

Transparency be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to investment treaties concluded before the date of coming into effect of the Rules on Transparency, to the extent such application is consistent with those investment treaties.”<sup>4</sup>

3. At that session, the Commission recorded consensus to entrust the Working Group with the task of preparing a convention (“convention” or “transparency convention”) on the application of the Rules on Transparency to existing investment treaties, taking into account that the aim of the convention was to give those States that wished to make the Rules on Transparency applicable to their existing investment treaties an efficient mechanism to do so, without creating any expectation that other States would use the mechanism offered by the convention.<sup>5</sup>

4. At its fifty-ninth session (Vienna, 16-20 September 2013), the Working Group completed its first reading of the transparency convention, as contained in document A/CN.9/784. In accordance with the request of the Working Group at its fifty-ninth session, this note contains an annotated draft of the transparency convention, based on the deliberations and decisions of the Working Group (A/CN.9/794, para. 12). It has been prepared for the consideration by the Working Group for its second reading of the transparency convention.

## **II. Draft convention on transparency in treaty-based investor-State arbitration**

### **A. General remarks**

#### **1. Relation between the convention on transparency and existing investment treaties**

5. At its fifty-ninth session, the Working Group considered in broad terms the nature and effect of the transparency convention in relation to existing investment treaties, and specifically whether the transparency convention, upon coming into force, would constitute a successive treaty creating new obligations (pursuant to article 30 of the Vienna Convention, or whether it would constitute an amendment or modification of existing investment treaties (subject to amendment or modification provisions of those treaties and to which Part IV of the Vienna Convention would apply as a secondary source of law) (A/CN.9/794, paras. 17-22; see also A/CN.9/WG.II/WP.179, paras. 5-7). At that stage of deliberations, it was noted that a great number of delegations were inclined to view the transparency convention as a successive treaty pursuant to article 30 of the Vienna Convention, but that delegations would consider the matter further (A/CN.9/794, para. 22) (see also below, para. 30).

#### **2. Draft proposal for a resolution of the General Assembly**

6. The Working Group may wish to recall its decision at its fifty-ninth session that the mandate given by the Commission to the Working Group (as recalled above, in para. 3) would not be included in the preamble of the transparency convention, but rather, that text along the following lines would be included in the proposal for the General Assembly resolution recommending the transparency convention: “Recalling that the Commission recommended that the Rules on Transparency be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to investment treaties concluded before the coming into effect of the Rules on Transparency, to the extent such application is consistent with those investment treaties; Recalling that the Commission decided to prepare a convention that was intended to give those States that wished to make the Rules on Transparency applicable to their existing investment treaties an efficient mechanism to do so, without creating any expectation that other States would use the mechanism offered by the convention; Acknowledging that the Rules on Transparency might be made applicable to investor-State arbitration initiated pursuant to investment treaties concluded before the

<sup>4</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 116.

<sup>5</sup> *Ibid.*, para. 127.

date of coming into effect of the Rules on Transparency by means other than a convention ... Calls upon those Governments that wish to make the Rules on Transparency applicable to arbitrations under their existing investment treaties to consider becoming party to the Convention” (A/CN.9/794, para. 41).

## **B. Annotated draft convention on transparency in treaty-based investor-State arbitration**

### **1. Text of the draft convention on transparency**

7. The draft text of the convention on transparency reads as follows.

#### *Preamble*

*“The Parties to this Convention,*

*[“Reaffirming their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,*

*“Convinced that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, significantly contributes to universal economic cooperation among all States on a basis of equality and common interest, and to the well-being of all peoples,]*

*“Recognizing the value of arbitration as a method of settling disputes that may arise in the context of international relations, and the extensive and wide-ranging use of arbitration for the settlement of investor-State disputes,*

*“Also recognizing the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,*

*“Believing that the Rules on Transparency in Treaty-based Investor-State Arbitration adopted by the United Nations Commission on International Trade Law on 11 July 2013 (“UNCITRAL Rules on Transparency”), effective as of 1 April 2014, would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes,*

*“Noting the great number of treaties providing for the protection of investments or investors already in force, and the practical importance of promoting the application of the UNCITRAL Rules on Transparency to arbitration under those already concluded treaties,*

*“Have agreed as follows:*

#### *“Scope of application*

##### *“Article 1*

*“1. This Convention applies to investor-State arbitration conducted on the basis of a treaty providing for the protection of investments or investors (‘[investment] treaty’).*

*“2. The term ‘[investment] treaty’ means any bilateral or multilateral treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty, which contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to that [investment] treaty.*

#### *[“Interpretation*

##### *“Article 2*

*“In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.]*

*“Application of the UNCITRAL Rules on Transparency**“Article 3*

“1. Each Contracting Party to this Convention agrees that the UNCITRAL Rules on Transparency, as they may be revised from time to time, shall apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, conducted pursuant to a[n investment] treaty concluded before 1 April 2014:

“a. where the State of the claimant is a Contracting Party to this Convention; and

“b. where the State of the claimant is not a Contracting Party to this Convention or that State has made a relevant reservation under article 5, but the claimant agrees to the application of the UNCITRAL Rules on Transparency.

“2. The final sentence of article 1(7) of the UNCITRAL Rules on Transparency shall not apply to arbitrations arising under [investment] treaties falling under paragraph 1(a).

“3. A most favoured nation provision cannot be invoked to avoid the application of the UNCITRAL Rules on Transparency under this Convention, nor to render the UNCITRAL Rules on Transparency applicable would they otherwise not apply.

*“Declaration on future [investment] treaties**“Article 4*

“A Contracting Party may declare that the UNCITRAL Rules on Transparency, as they may be revised from time to time, shall apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, conducted pursuant to a[n investment] treaty concluded on or after 1 April 2014:

“a. where the State of the claimant is a Contracting Party to this Convention; and/or

“b. where the State of the claimant is not a Contracting Party to this Convention or that State has made a relevant reservation under article 5, but the claimant agrees to the application of the UNCITRAL Rules on Transparency.

*“Reservations**“Article 5*

“1. A Contracting Party may declare that:

“a. a specific [investment] treaty, identified by title, name of Parties to that [investment] treaty, and date that [investment] treaty was concluded, shall not be subject to this Convention;

“b. article 3(1)(a) and/or (1)(b), and, if applicable, article 4(a) and/or (b) shall not apply to arbitrations conducted using certain sets of arbitration rules or procedures other than the UNCITRAL Arbitration Rules;

“c. article 3(1)(b) and/or, if applicable, article 4(b) will not apply to arbitrations to which it is a disputing party.

“2. In the event of amendment to the UNCITRAL Rules on Transparency, a Contracting Party may, within six months of the adoption of such amendment, make a reservation that such revised version of those Rules shall not apply under this Convention and that, instead, the most recent version of the UNCITRAL Rules on Transparency to which that Contracting Party had not filed a reservation pursuant to this paragraph, shall apply.

“3. No reservations are permitted to this Convention other than as provided in this article.

*“Declarations and reservations**“Article 6*

“1. Reservations and declarations may be made by a Contracting Party at any time, save for reservation under article 5(2).

“2. Declarations, reservations, and their confirmations are to be formally notified to the depositary.

“3. Declarations and reservations made at the time of signature are subject to confirmation upon ratification, acceptance or approval. Such a declaration or a reservation takes effect simultaneously with the entry into force of this Convention in respect of the Contracting Party concerned.

“4. A declaration or a reservation of which the depositary receives formal notification after the entry into force of the Convention takes effect on the first day of the month following the expiration of twelve months after the date of its receipt by the depositary.

“5. Any Party that makes a declaration or a reservation under this Convention may withdraw it at any time and may, subject to article 5, modify it at any time. Such modifications or withdrawals are to be formally notified to the depositary.

“6. [A modification or withdrawal which has the purpose or effect of expanding the application of the UNCITRAL Rules on Transparency is to take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the depositary.] Any [other] modification or withdrawal is to take effect on the first day of the month following the expiration of twelve months after the date of receipt of the notification by the depositary.

*“Depositary**“Article 7*

“The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

*“Signature, ratification, acceptance, approval, accession**“Article 8*

“1. This Convention is open until [date] for signature by (a) any State that is a Party to a[n investment] treaty; or (b) a regional economic integration organization constituted by sovereign States that is a Party to a[n investment] treaty.

“2. This Convention is subject to ratification, acceptance or approval by the signatories to this Convention.

“3. This Convention is open for accession by all States or regional economic integration organizations referred to in paragraph 1 which are not signatories as from the date it is open for signature.

“4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

*“Effect in territorial units**“Article 9*

“1. If a Contracting State has two or more territorial units, which are parties to [investment] treaties in their own name, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to such territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time. [The Contracting Party may, in such declaration, make any of the reservations under article 5 with respect to each territorial unit that it so designates.]

“2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

“3. When a Contracting State has declared pursuant to this article that this Convention extends to one or more but not all of such territorial units, a place located in a territorial unit to which this Convention does not extend is not considered to be in a Contracting State for the purposes of this Convention.

“4. If a Contracting State makes no declaration pursuant to paragraph 1 of this article, the Convention is to extend to all territorial units of that Contracting State.

#### *“Participation by regional economic integration organizations*

##### *“Article 10*

“1. Any reference to a ‘Contracting Party’, ‘Contracting Parties’ or ‘State’ in this Convention applies equally to a regional economic integration organization when the context so requires.

“2. When the number of Contracting Parties is relevant in this Convention, the regional economic integration organization does not count as a Contracting Party in addition to its member States which are Contracting Parties.

#### *“Entry into force*

##### *“Article 11*

“1. This Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.

“2. When a State or a regional economic integration organization ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State or a regional economic integration organization on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

#### *“Time of application*

##### *“Article 12*

“This Convention and any declaration or reservation apply only to arbitrations that have been commenced after the date when the Convention, declaration or reservation enters into force or takes effect in respect of each Contracting Party.

#### *“Revision and amendment*

##### *“Article 13*

“1. At the request of not less than one-third of the Contracting Parties to this Convention, the Secretary-General of the United Nations shall convene a conference of the Contracting Parties for revising or amending it.

“2. Any instrument of ratification, acceptance, approval or accession, deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

#### *“Denunciation of this Convention*

##### *“Article 14*

“1. A Contracting Party may denounce this Convention at any time by means of a notification in writing addressed to the depositary. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary.

“2. This Convention will continue to apply to arbitrations in respect of which arbitral proceedings have been commenced before the denunciation takes effect.

“DONE at [place], this [date], in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

“IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised [by their respective Governments], have signed the present Convention.”

## 2. Annotations to the draft convention on transparency

### *Remarks on the preamble*

8. At its fifty-ninth session, the Working Group found the preamble acceptable in substance subject to further consideration of the first two paragraphs. The Working Group agreed to consider further whether to retain or delete these two paragraphs (now in square brackets), or to replace them with a single paragraph recalling the mandate of UNCITRAL (A/CN.9/794, para. 35).

9. Should the Working Group determine that a single paragraph recalling the mandate of UNCITRAL should replace these two paragraphs, it may wish to consider the following wording: “Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, by which the General Assembly established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade.”

10. The Working Group may wish to note that the date of adoption, effective date and title of the Rules on Transparency have been included in the fifth paragraph of the preamble. The words “providing for the protection of investments or investors” have been added after the word “treaties” in the first line of the sixth paragraph of the preamble in order to harmonize the language of the preamble with that of article 1 of the convention.

### **Remarks on draft article 1 — Scope of application**

11. Article 1 deals with the material scope of application of the transparency convention and article 3 with the substantive obligations of Contracting Parties under the transparency convention.

12. At its fifty-ninth session, the Working Group agreed that the scope of application of the transparency convention should be drafted to give effect to the mandate given by the Commission, namely, to give those States that wished to apply the Rules on Transparency an efficient mechanism to do so, and moreover to promote transparency in treaty-based investor-State arbitration (A/CN.9/794, para. 56). A broad scope of application of the transparency convention was agreed to on the basis that a Contracting Party could formulate specific reservations (pursuant to article 5 of the transparency convention) limiting that scope of application (A/CN.9/794, paras. 28, 32; 44-66).

### *Paragraphs (1) and (2)*

13. Paragraphs (1) and (2) reflect the deliberations of the Working Group at its fifty-ninth session (A/CN.9/794, paras. 66 and 71). As matters of drafting, the phrase “including any treaty commonly referred to as (...) or bilateral investment treaty” has been placed before the words “which contains provisions (...)”. Furthermore, the Working Group may wish to consider whether the word “treaty”, which is defined in the first footnote of article 1(1) of the Rules on Transparency, or the phrase “investment treaty”, which was said possibly to be more appropriate in the context of the transparency convention, ought to be the relevant defined term in the convention (A/CN.9/794, paras. 69 and 71).

### **Remarks on draft article 2 — Interpretation**

14. The Working Group agreed to consider further at its second reading whether to retain or to delete article 2 (now in square brackets) (A/CN.9/794, paras. 83-88), and in particular whether that provision would have any implications for interpreting the convention alongside the Vienna Convention.

*Remarks on draft article 3 — Application of the UNCITRAL Rules on Transparency*

15. Article 3 is based on draft proposals made at the fifty-ninth session of the Working Group (A/CN.9/794, paras. 51, 97 and 105).

*Paragraph (1)*

*“as they may be revised from time to time”*

16. At its fifty-ninth session, the Working Group agreed to include in article 3 language along the lines of “as they may be revised from time to time”, and further agreed to provide for a possible reservation in that respect (see article 5(2) of the transparency convention) (A/CN.9/791, paras. 91-93, 100).

*“whether or not initiated under the UNCITRAL Arbitration Rules”*

17. At its fifty-ninth session, the Working Group considered that the transparency convention should apply regardless of the arbitration rules selected by an investor under a relevant investment treaty. A reservation under article 5(1)(b) of the transparency convention provides for the limitation of the application of the transparency convention to arbitrations conducted under certain sets of procedural rules other than the UNCITRAL Arbitration Rules (A/CN.9/794, paras. 30-32) (see also below, para. 33).

*“concluded before 1 April 2014”*

18. Under article 3, the Rules on Transparency apply to investment treaties concluded before 1 April 2014. This reflects the decision of the Working Group that an application of the transparency convention to future investment treaties should be the exception, and that consequently Contracting Parties should expressly declare (under article 4 of the transparency convention) that the transparency convention would apply to investment treaties concluded on or after 1 April 2014 (A/CN.9/794, paras. 57, 58 and 90).

*“State of the claimant”*

19. The Working Group may wish to note that, to address the concern that the term “State of the claimant” (instead of “Contracting Party”) used in paragraph (1)(a) and (b) might lead to difficulties, for example in relation to regional economic integration organizations (A/CN.9/795, para. 95), article 10(1) has been amended to provide that any reference to a “State” in the transparency convention applies equally to a regional economic integration organization when the context so requires.

*Subparagraphs (a) and (b)*

20. Subparagraphs (a) and (b) address the request of the Working Group to keep separate the effect of the transparency convention where the home State of the investor and the respondent State have both acceded to the transparency convention, and the effect when only the respondent State has acceded to the transparency convention.

21. In the latter case, the Working Group considered that the transparency convention would amount to a general unilateral offer to investors to use the Rules on Transparency, even where that investor’s home State is not a Contracting Party to the transparency convention or where it has formulated a reservation (A/CN.9/794, paras. 23-29; 48; 104-114).

*Paragraph (2)*

22. Paragraph (2) aims to ensure that the last sentence of article 1(7) of the Rules on Transparency — which reads “Notwithstanding any provision in these Rules, where there is a conflict between the Rules on Transparency and the treaty, the provisions of the treaty shall prevail” — does not serve to nullify the effect and purpose of the transparency convention (A/CN.9/794, paras. 77, 79, 101, 109-112). Paragraph (2) is not applicable to unilateral offers (under article 3(1)(b) of the convention), nor to treaties concluded after 1 April 2014.



*Paragraph (3)*

23. As a matter of principle, the Working Group considered at its fifty-ninth session whether a most-favoured-nation clause (MFN clause) in an investment treaty could be triggered by a carve-out of certain investment treaties from the transparency convention (A/CN.9/794, para. 118). It was pointed out that arbitral practice was not uniform in relation to whether MFN clauses can apply to procedural matters, and that in any event, the deliberations of the Working Group on that matter could not, and should not, be interpreted as taking a position on the question of whether MFN clauses applied to dispute settlement procedures under investment treaties (A/CN.9/794, para. 119).<sup>6</sup>

24. The purpose of inserting a provision relating to MFN clauses in the transparency convention is to clarify that a claimant could not (i) avoid application of the Rules on Transparency by invoking an MFN clause to claim that the non-transparent dispute resolution provisions of another treaty were more favourable to it; or (ii) conversely invoke an MFN clause to make the Rules on Transparency applicable to its arbitration in circumstances where the Rules would not otherwise apply (A/CN.9/794, paras. 120 and 121).

*Remarks on draft articles 4 to 6*

25. At its fifty-ninth session, the Working Group considered that the subject matters on which reservations could be made under the transparency convention could be described as follows: (i) exclusion of certain investment treaties from the application of the transparency convention; (ii) exclusion of arbitration under certain arbitration rules; (iii) exclusion of the application of the provisions of article 3(1)(b); and (iv) reserving out of the application of a revised or amended version of the Rules on Transparency. These reservations would limit the scope of application of the convention and are contained in article 5 (A/CN.9/794, paras. 116 and 117).

26. The Working Group unanimously agreed that it would be unacceptable for a Contracting Party to accede to the transparency convention and then carve out the entire content of the transparency convention by use of the reservations (A/CN.9/794, paras. 131-133).

27. The Working Group also agreed that a declaration expanding the scope of application of the transparency convention to future investment treaties ought to be included. That declaration is contained in article 4 (A/CN.9/794, paras. 116 and 117).

*Article 4 (Declaration on future treaties)*

28. At its fifty-ninth session, the Working Group determined that an application of the transparency convention to investment treaties concluded after 1 April 2014 (“future investment treaties”) should be permitted where Contracting Parties so declared (A/CN.9/794, paras. 53-58, 116-117).

29. As currently drafted, article 4 provides that a Contracting Party can apply the transparency convention to future investment treaties where the other Party(ies) to the investment treaty concerned has(have) made the same declaration, and/or unilaterally to any dispute to which it is a party. Thus article 4 is entirely an “opt-in” provision.

30. In instances where the transparency convention applies to future investment treaties and the Parties to such treaties are also Contracting Parties to the transparency convention (see article 4(a)), the Working Group may wish to consider the relationship between such treaties with the obligations imposed under the transparency convention. For example, the Working Group may wish to consider whether a future investment treaty concluded after the coming into effect of the transparency convention would amount to a successive treaty, as regards its provisions on transparency and, in particular, how the existence of transparency

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<sup>6</sup> The Study Group on The Most-Favoured-Nation clause established by the International Law Commission has noted that whether or not an MFN provision is capable of applying to the dispute settlement provisions is a matter of treaty interpretation and thus depends on each particular treaty. The question of interpretation arises, as in the majority of cases, when the MFN provisions in existing BITs are not explicit as to the inclusion or exclusion of dispute settlement clauses. See, for instance, *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 162.

— or indeed confidentiality — provisions in a future investment treaty would affect the obligations in the transparency convention.

31. The Working Group may wish to consider that the reservations under article 5 have been made expressly applicable in respect to the declaration under article 4.

*Article 5 (Reservations) (numbered article 4 in the previous draft)*

32. In relation to article 5(1)(a), the Working Group agreed that it would be contrary to the mandate given by the Commission to the Working Group to provide that the transparency convention would apply only to investment treaties positively listed by States at the time of adoption; rather it would be for States wishing to carve out certain treaties from the transparency convention to list the excluded treaties in their reservation (A/CN.9/794, para. 122).

33. The effect of the reservation under article 5(1)(b) would be to limit the operation of the transparency convention to options to arbitrate under certain sets of arbitration rules in the reserving Contracting Party's investment treaties, it being understood that the UNCITRAL Arbitration Rules are excluded from the scope of that reservation (A/CN.9/794, paras. 138 and 139).

34. In relation to article 5(1)(c), the Working Group may wish to recall its agreement that a reservation in respect of the provisions of article (3)(1)(b) (and the corresponding provisions in article 4) would mean that a Contracting Party was not willing to make a global unilateral offer for the application of the Rules on Transparency at a given point in time. However, that was not inconsistent with such a State agreeing to the application of the Rules on Transparency to a specific arbitration in accordance to article 1 (2)(a) of such Rules at a later point in time (A/CN.9/794, para. 113).

35. The Working Group may wish to consider that, where Parties to an investment treaty have formulated different reservations under the transparency convention (for instance, adopting different sets of Rules on Transparency in case of revision, or reserving from the application of the transparency convention different sets of arbitration rules under article 5(1)(b)), the applicable reservations should be those formulated by the State party to the dispute. The Working Group may wish to consider whether a provision should be added in the transparency convention to clarify the operation of the reservations in such situations.

36. In relation to paragraph (3), the Working Group may wish to recall the clear indication of consensus at its fifty-ninth session that the only reservations ought to be those enumerated in the transparency convention (A/CN.9/794, para. 147).

*Article 6 (Declarations and reservations) (provisions contained in article 4 in the previous draft)*

37. In relation to paragraph (4), the Working Group agreed that if reservations were to be allowed after accession, a point on which further deliberations would be needed, then a one-year period after the date of receipt of the notification by the repository should be required before the entry into force of the reservation (A/CN.9/794, paras. 123-126, 149-152). This period of time was considered sufficiently long to prevent abuse.

38. In relation to paragraph (6) and the modification or withdrawal of existing reservations or declarations, the Working Group considered that a shorter period of time than twelve months might be required if the modification or withdrawal provided for greater transparency, rather than less (A/CN.9/794, paras. 153-157). The Working Group may wish to consider whether having two different timings (one year for "decreased transparency" and six months for "increased transparency") might lead to confusion and/or lack of certainty, and moreover whether the judgement implied in that determination would be sufficiently simple and uniformly applied.

**Remarks on draft article 8 — Signature, ratification, acceptance, approval, accession**  
(numbered article 6 in the previous draft)

39. Article 8 reflects the drafting suggestions made by the Working Group at its fifty-ninth session (A/CN.9/794, paras. 161-164).

**Remarks on draft article 9 — *Effect in territorial units*** (numbered article 7 in the previous draft)

40. Article 9 reflects the drafting suggestions made by the Working Group at its fifty-ninth session (A/CN.9/794, paras. 165-167). The Working Group may wish to consider whether a Contracting Party should be allowed to make reservations (defined in article 5) with respect to its territorial units, as provided in the last sentence of paragraph (1) (now in square brackets).

**Remarks on draft article 10 — *Participation by regional economic integration organizations*** (numbered article 8 in the previous draft)

41. As provided for under article 8, in addition to “States”, the transparency convention allows participation by international organizations of a particular type, namely “regional economic integration organizations” that are Parties to investment treaties. Following the definition of “regional economic integration organizations” under article 8, the drafting of article 10 has been simplified in accordance with the decision of the Working Group (A/CN.9/794, paras. 168-170).

**Remarks on draft article 11 — *Entry into force*** (numbered article 9 in the previous draft)

42. Article 11 includes the drafting modifications agreed to by the Working Group at its fifty-ninth session (A/CN.9/794, paras. 171-175). It reflects the consensus achieved in relation to the number of signatories to be required for the transparency convention to enter into force, that number being three (A/CN.9/794, para. 174).

**Remarks on draft article 12 — *Time of application*** (numbered article 10 in the previous draft)

43. While draft article 11 concerns the entry into force of the transparency convention as regards the international obligations of the Contracting Parties arising under the convention, draft article 12 determines the point in time when the transparency convention would commence to apply in respect of the arbitral proceedings. The transparency convention would only apply prospectively, that is to arbitrations commenced after the date when the convention entered into force. The words “in respect of each Contracting Party” are intended to make it clear that the article refers to the time when the transparency convention would enter into force in respect of the Contracting Party in question, and not when the transparency convention would enter into force generally (A/CN.9/794, paras. 158 and 176).

**Remarks on draft article 13 — *Revision and amendment*** (numbered article 11 in the previous draft)

44. Article 13 reflects the drafting suggestions made by the Working Group at its fifty-ninth session (A/CN.9/794, paras. 177-178).



## II. ONLINE DISPUTE RESOLUTION

### A. Report of Working Group on Online Dispute Resolution on the work of its twenty-eighth session (Vienna, 18-22 November 2013) (A/CN.9/795)

[Original: English]

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### I. Introduction

1. At its forty-third session, (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution (“online dispute resolution” or “ODR”) relating to cross-border electronic commerce transactions.

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reaffirmed the mandate of Working Group III relating to cross-border electronic transactions, including B2B and B2C transactions.<sup>1</sup> The Commission decided, *inter alia*, at that session that, in general terms, in the implementation of its mandate, the Working Group should also consider specifically the impact of its deliberations on consumer protection and that it should report to the Commission at its forty-fifth session.<sup>2</sup>

3. At its forty-fifth session (New York, 25 June-6 July 2012), the Commission reaffirmed the mandate of the Working Group in respect of low-value, high-volume cross-border electronic transactions, and the Working Group was encouraged to continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, and to continue to conduct its work in the most efficient manner possible.<sup>3</sup> It was further agreed that the Working Group should consider and report back at a future session of the Commission on how the draft rules would respond to the needs of developing countries and those facing post-conflict situations, in particular with regard to the need for

<sup>1</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 218.

<sup>2</sup> *Ibid.*, para. 218.

<sup>3</sup> *Ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 79.

an arbitration phase to be part of the process; and that the Working Group should continue to include in its deliberations the effects of online dispute resolution on consumer protection in developing and developed countries and countries in post-conflict situations.<sup>4</sup> The Commission furthermore requested the Working Group to continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, including arbitration and possible alternatives to arbitration.<sup>5</sup> At its forty-sixth session, the Commission unanimously confirmed the decisions made at its forty-fifth session.<sup>6</sup>

4. The most recent compilation of historical references regarding the consideration by the Commission of the work of the Working Group can be found in document A/CN.9/WG.III/WP.122, paragraphs 5-15.

## II. Organization of the session

5. Working Group III (Online Dispute Resolution), which was composed of all States members of the Commission, held its twenty-eighth session in Vienna, from 18 to 22 November 2013. The session was attended by representatives of the following States members of the Working Group: Argentina, Australia, Austria, Brazil, Bulgaria, Canada, China, Colombia, Croatia, El Salvador, France, Germany, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Malaysia, Mexico, Pakistan, Panama, Paraguay, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, Ukraine, United States of America and Venezuela (Bolivarian Republic of).

6. The session was also attended by observers from the following States: Belgium, Bolivia (Plurinational State of), Burkina Faso, Chile, Cyprus, Czech Republic, Democratic Republic of the Congo, Dominican Republic, Lithuania, Netherlands, Peru, Portugal, Qatar, Romania, Saudi Arabia and Togo.

7. The session was also attended by observers from the European Union.

8. The session was also attended by observers from the following international organizations:

(a) Inter-governmental organizations: Organisation of Islamic Cooperation (OIC) and Permanent Court of Arbitration (PCA);

(b) Invited non-governmental organizations: Centre for Commercial Law Studies (Queen Mary University of London), Center for International Legal Education (CILE), CISG Advisory Council, European Multi-channel and Online Trade Association (EMOTA), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), Institute of Law and Technology (Masaryk University), Instituto Latinoamericano de Comercio Electrónico (ILCE), and Internet Bar Organization (IBO).

9. The Working Group elected the following officers:

*Chairman:* Mr. Soo-geun OH (Republic of Korea)

*Rapporteur:* Ms. Cecilia Ines SILBERBERG (Argentina)

10. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.122);

(b) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (A/CN.9/WG.III/WP.123 and Add.1);

(c) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: overview of private enforcement mechanisms (A/CN.9/WG.III/WP.124);

(d) A proposal by the European Union observer delegation (A/CN.9/WG.III/WP.121);

<sup>4</sup> Ibid., para. 79.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 222.

(e) A proposal by the Government of Canada on principles applicable to online dispute resolution providers and neutrals (A/CN.9/WG.III/WP.114); and

(f) A proposal by the Governments of Colombia, Honduras, Kenya and the United States (A/CN.9/WG.III/WP.125).

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of online dispute resolution for cross-border electronic transactions: draft procedural rules.
5. Other business.
6. Adoption of the report.

### **III. Deliberations and decisions**

12. The Working Group resumed its work on agenda item 4 on the basis of notes prepared by the Secretariat (A/CN.9/WG.III/WP.123 and its addendum; A/CN.9/WG.III/WP.124). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV.

13. At the closing of its deliberations, the Working Group requested the Secretariat (i) to prepare a revised draft of procedural rules on online dispute resolution (the “Rules”) based on deliberations and decisions of the Working Group, and in that respect, to make the necessary drafting adjustments to ensure consistency of language in the text of the Rules; (ii) to draft preliminary guidelines that would indicate elements of the Rules that might better be directed toward ODR providers and platforms rather than contained in procedural rules; and (iii) resources permitting, to prepare a report in relation to current practices in the online dispute resolution market for a future session.

## **IV. Online dispute resolution for cross-border electronic transactions: draft procedural rules**

### **A. General remarks**

14. The Working Group recalled the progress it had made to date and addressed the need to frame its work within the broader context of the online dispute resolution system it was considering.

15. It was suggested that a key conceptual issue that ought to be considered was that of the intended “audience” of the Rules; and in particular, that because the Rules envisaged that an ODR provider would administer disputes, it was possible that ODR providers would offer the ODR Rules, or a modified version of the ODR Rules, to merchants. Consequently the Rules might be seen as a set of model rules for ODR providers, forming a basis on which a provider might create its own rules (A/CN.9/WG.III/WP.123, paras. 5-7). Consequential issues that might arise out of this type of analysis were said to be, for example, the need to consider further the relationship between a merchant and an ODR provider, and in terms of the content of the Rules, how, when and by which entity a streaming mechanism might be effected.

16. It was also stated in relation to both tracks of a two-track system, but especially in relation to Track II of the Rules, that private enforcement mechanisms comprised an important means by which ODR might be successfully implemented in practice.

17. It was proposed to proceed by considering Track II of the Rules, as contained in document A/CN.9/WG.III/WP.123/Add.1, followed by a consideration of private

enforcement mechanisms in the context of the system being devised by the Working Group, and then by a consideration of Track I of the Rules and document A/CN.9/WG.II/WP.125.

18. A proposal was further made that the Secretariat ought to prepare a report for a future session in relation to current practices in the online dispute resolution market. It was agreed that the Secretariat would prepare that report for a future session, resources permitting.

19. Document A/CN.9/WG.III/WP.125 (a proposal by Colombia, Honduras, Kenya and the United States) was introduced, which related to the decision of the Commission that the Working Group ought to consider and report back at a future session in relation to how the Rules would respond to the needs of developing countries and those facing post-conflict situations, in particular with regard to the need for an arbitration phase to be part of the process (see A/68/17, para. 222). It was said that document A/CN.9/WG.III/WP.125 should be discussed first as this would effectively determine whether the Working Group would adopt the Track I or Track II process. It was requested by delegations introducing the proposal set out in document A/CN.9/WG.III/WP.125 that the Working Group address the proposal at its twenty-eighth session consistent with the mandate given by the Commission at its forty-sixth session in relation to how the Rules would respond to the needs of developing countries and those facing post-conflict situations, in particular with regard to the need for an arbitration phase to be part of the process, as set out above.<sup>1</sup>

20. In response, it was observed that the Working Group had agreed to consider ODR in terms of a two-track system at its twenty-sixth and twenty-seventh sessions, and that the Commission had endorsed the progress made by the Working Group and made a reference to that compromise approach. It was clarified that a two-track approach did recognize arbitration as one potential outcome of the ODR process. It was also observed that a clear and simple process for online dispute resolution could empower small businesses.

21. There was general support for the proposal set out in paragraph 17 above, and the Working Group proceeded to consider Track II of the Rules as contained in document A/CN.9/WG.III/WP.123/Add.1. It was said that as a background consideration, delegations might wish to keep in mind whether Track II provisions could be streamlined or simplified given the absence of a final arbitration stage of proceedings.

## **B. Notes on draft procedural rules**

### **1. Draft preamble**

22. The Working Group considered the draft preamble as contained in paragraph 4 of document A/CN.9/WG.III/WP.123/Add.1.

#### *Paragraph (1)*

##### *“Low-value, high-volume”*

23. It was queried whether the term “low-value, high-volume” was sufficiently clear. It was said that the meaning of that term was fundamental to the application of the Rules.

24. In relation to the term “high-volume”, it was said that for a user of the Rules, the fact of whether or not the dispute arising out of that individual’s transaction was one of a number of disputes would not be relevant (see A/CN.9/WG.III/WP.123, para. 12). Some delegations opposed deleting the term “high-volume”. Following discussion it was decided to delete the words “high-volume” from the preamble.

25. In relation to the term “low-value” (see also paragraphs 31-32 below) in the preamble, diverging views were expressed in relation to whether that term ought to be defined. On the one hand, it was said that providing a definition would increase clarity as to when the Rules applied, and was said to be particularly relevant in that context from a consumer-protection standpoint. It was also said that any abuse of the use of the Rules would be limited if its scope was indeed limited to low-value transactions. On the other hand, it was said that creating a definition would be exceedingly difficult, not least because the definition of “low-value” could change over time and across borders; in that respect, the Working Group

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<sup>1</sup> Ibid.



recalled its agreement at its twenty-fourth session that such a definition ought not to be included in the Rules, but indicative information set out in guidelines (A/CN.9/739, para. 16).

26. It was also clarified that the likelihood in practice would be that an ODR provider would in fact set the threshold of what constituted low-value transactions and that guidelines or guidance might thus be the most realistic means of regulating that concept.

27. Delegations in support of the inclusion of a definition of “low-value” were invited to provide specific proposals in that respect.

*Paragraph (2)*

28. The Working Group considered whether to remove the square brackets from the list of documents referred to in paragraph (2) of the draft preamble. It was said that it might be premature to remove the brackets at this stage of deliberations, since the existence or nature of those documents had not yet been determined.

*Paragraph (3)*

29. It was suggested that paragraph (3) might create confusion in terms of the hierarchy of applicable rules, and moreover that it was in any event redundant. After discussion, the Working Group agreed to delete paragraph (3).

**2. Draft article 1 (Scope of application)**

30. The Working Group considered draft article 1 as contained in paragraph 5 of document A/CN.9/WG.III/WP.123/Add.1.

*General*

*“low-value” (see also paras. 25-27 above)*

31. It was said that, as drafted, paragraph (1) of draft article 1 made the Rules applicable to any transaction conducted by use of electronic communications, not just low-value, high-volume transactions, and that such a meaning was contrary to the mandate of the Working Group.

32. It was suggested to include a definition for “low-value” in draft article 1, in addition to, or in lieu of, the use of that term in the preamble. Another suggestion was made not to include the phrase “low-value” in draft article 1, but rather to replace the words “intended for use” in the preamble with “shall be used” in order to clarify the scope of application there. It was agreed to consider those suggestions further subject to proposals put forward in relation to the term “low-value” in the context of the preamble.

*Paragraph (1)*

33. It was said that the inclusion of the words “at the time of the transaction” was unnecessary as parties ought to be able to agree at any time to resort to ODR under Track II. After discussion, it was agreed to delete that phrase.

*Paragraph (1)(bis)*

34. It was suggested that paragraph (1)(bis) might relate more appropriately to Track I proceedings than to simplified Track II proceedings, where such formality might not be required.

35. It was furthermore stated that the drafting of paragraph (1)(bis) might not be entirely consistent with the nature of mediation, in which it was said parties could withdraw at any time. In that respect, it was suggested to delete the word “exclusively”. That proposal received support and the Working Group consequently agreed that that word would be deleted.

36. It was said in other respects that the square brackets in that paragraph ought to be retained and its contents considered further at a later stage of proceedings.

*Paragraph (2)**Exhaustive list*

37. It was suggested that there ought to be an exhaustive list of the types of claims that may be brought. That suggestion was accepted.

38. Consequently a suggestion was made that the listing of the types of claims that may be brought cannot be finally determined until there has been discussion on the substantive legal principles relating to those claims. Another suggestion was made to place square brackets around the word “only” in the chapeau, on the grounds that the sole issue for future discussion in relation to this paragraph was whether other types of claims could be contemplated.

39. After discussion, it was agreed to move the opening exterior square bracket and place it in front of subparagraph (a), thus leaving the entire paragraph except the chapeau within square brackets.

*Goods and services*

40. It was suggested that the square-bracketed text within subparagraphs (a) and (b) respectively should remain and the square brackets removed, on the grounds that claims should include services as well as goods. That suggestion was accepted.

*“At the time of the transaction”*

41. It was suggested that the words “at the time of the transaction” be deleted from subparagraph (a) because they restricted excessively the basis on which a claim may be brought by excluding agreements or arrangements that may be relevant but have been concluded other than at the time of the transaction. That suggestion was accepted and it was agreed to delete that phrase.

*“In accordance with the agreement”*

42. After discussion, it was agreed to reconsider whether the phrase “in accordance with the agreement” in subparagraph (a) adequately addressed a situation in which goods, while having been received by a purchaser, did not in fact function or perform properly. In that respect it was agreed that the Secretariat would suggest possible alternatives to that phrase, for consideration of the Working Group at a future session.

*Paragraph (3)*

43. It was suggested to remove the square brackets and retain the text of paragraph (3). It was said in support of that suggestion that paragraph (3) reflected a key provision contained in article 1(3) of the UNCITRAL Conciliation Rules.

44. In response to a question in relation to how the applicable law from which the parties could not derogate would be determined in an online environment, it was clarified that in relation to a party’s invocation of applicable law, no difference existed as between an online and an offline environment.

45. After discussion, it was agreed to retain the contents of paragraph (3) and remove the square brackets.

**3. Draft article 2 (Definitions)**

46. The Working Group considered draft article 2 as contained in paragraph 7 of document A/CN.9/WG.III/WP.123/Add.1.

*Paragraph (1) — “ODR”*

47. There was no objection to the definition of “ODR” as contained in paragraph (1), and it was consequently agreed to retain the language therein.

*Paragraphs (2) and (3) — “ODR platform” and “ODR provider” respectively*

48. With respect to “ODR platform” and “ODR provider”, a concern was raised that the definition of these terms in Rules did not fully reflect the contemporary practice of online dispute resolution. Specifically it was said that the practice of online dispute resolution has evolved, such that in many instances, the platform is identified first and the provider specified only after a dispute arises.

49. A proposal was made (the “first proposal”) to reflect that concern by replacing paragraphs (2) and (3) as follows: Paragraph (2): “‘ODR platform’ means the entity specified in the dispute resolution clause that supplies a system for generating, sending, receiving, storing, exchanging or otherwise processing electronic communications used in ODR.” Paragraph (3): “‘ODR provider’ means the entity that administers ODR proceedings agreed upon by the parties; and should be specified in the dispute resolution clause if the specific ODR provider is known at the time of the transaction.”

50. It was clarified that because the phrase “at the time of a transaction” had been deleted from paragraph (1) of draft article 1 (see above paragraph 33) that the inclusion of that phrase at the end of the first proposal might also require further consideration.

51. By way of further background to the first proposal, it was said that such proposal was intended to capture — and to enable, rather than prescribe — all variations of ODR agreements that currently exist and that are implemented in practice. In that respect it was said that there were three existing methods of resolving an online dispute: first, where the ODR provider was the first point of contact with parties and appointed an ODR platform (a “provider-led” model, in relation to which Better Business Bureau in the United States was cited as an example); second, where the ODR platform was the first point of contact with parties and appointed an ODR provider depending on various considerations including the needs of the parties (a “platform-led” model, in relation to which Modria was given as an example); and third, where the ODR provider and platform were the same entity (in relation to which Ali Baba, a Chinese website, was given as an example).

52. In response to the first proposal, a concern was raised that such a proposal gave an enhanced function to an ODR platform, which had previously been envisaged in the Rules as a technological tool. It was said that such an approach would necessarily require additional guidance or requirements for ODR platforms, in addition to that proposed for ODR providers in the preamble to the Rules. It was furthermore said that to instil confidence in a cross-border dispute resolution process, purchasers ought to have transparent access to information in relation to the ODR process as well as the identity of the ODR provider. Specifically, it was said that key to the decision of purchasers to enter into a certain online dispute resolution process would be trust in the independence and impartiality of the ODR provider. It was said to be particularly important that since ODR was not an ad hoc process, that the parties must know the identity of the ODR provider, as the entity administering their dispute.

53. It was also suggested that because of the two major components of the ODR process manifest in the different roles of ODR platform and an ODR provider — a technical component, to be provided by the former, and a legal or substantive element, to be dealt with by the latter — that it was important to be clear in the Rules which entity was responsible to whom, and for what. A concern was expressed that should the ODR platform be designated before the ODR provider, a data exchange would necessarily take place between those two entities following a dispute, which might give rise to data protection issues.

54. It was said by way of an alternative proposal (the “second proposal”) that the language in paragraphs (2) and (3) as set out in paragraph 7 of document A/CN.9/WG.III/WP.123/Add.1, be retained in square brackets for further consideration alongside the first proposal.

55. A third proposal (the “third proposal”) was made on the basis that from the perspective of claimants, and particularly consumers, it was not necessary to specify in the Rules the difference between ODR providers and ODR platforms. It was said that from a claimant perspective, what mattered was that the Rules were efficient and transparent, and that the first and second proposals contained language that might be better contained in guidelines for the various actors in the dispute resolution process. It was suggested that only one “ODR entity” or “administrator” be referred to in the Rules, and that the Secretariat be requested to

draft preliminary guidelines that would indicate elements of the current set of Rules that might better be directed toward ODR providers and platforms rather than contained in procedural rules.

56. In response, it was suggested that, rather than defining a single entity that would maintain full claimant-facing contact and responsibility for the administration of the dispute, that such a “centralized” entity ought to be defined separately and in addition to the defined terms of ODR provider and ODR platform.

#### *Decision*

57. After discussion, it was agreed that the first proposal would be inserted in the Rules in square brackets. It was further agreed that the language in paragraphs (2) and (3) would be retained in square brackets as an alternative to the first proposal. In relation to the third proposal, the Secretariat was requested to prepare language that would define a single ODR entity for the purpose of the Rules, and mandated to prepare draft guidelines for the various actors involved in facilitating or undertaking the Rules. Thus those three proposals would form alternatives for the discussion of the Working Group at a future time.

#### *Paragraphs (4) and (5) — “claimant” and “respondent” respectively*

58. With respect to the definitions of “claimant” and “respondent”, a concern was raised that these terms did not reflect the provisions of the UNCITRAL Model Law on International Commercial Conciliation (2002) nor the UNCITRAL Conciliation Rules (1980), neither of which defined such terms. Consequently it was proposed that the terms “claimant” and “respondent” need not be defined in the Rules.

59. In response, it was said that notwithstanding the importance of consistency with other UNCITRAL instruments, the purpose of defining the terms “claimant” and “respondent” in the Rules was to make clear which party was initiating the ODR proceedings. After discussion, it was agreed to retain the terms “claimant” and “respondent” and the definitions of those terms set out in paragraph 7 of document A/CN.9/WG.III/WP.123/Add.1.

#### *Paragraph (6) — “neutral”*

60. It was queried whether a neutral could also be a legal person. It was clarified that a neutral could only be a physical person. A suggestion was made to replace the term “individual” in paragraph (6) with the term “persons” in order to reflect that approach. After discussion, it was agreed to retain the provision as contained in paragraph 7 of document A/CN.9/WG.III/WP.123/Add.1, including the word “individual”.

#### *Paragraph (7) — “communication”*

61. There were no objections to the wording in paragraph (7) and it was consequently agreed to retain the definition therein.

#### *Paragraph (8) — “electronic communication”*

62. In relation to the definition of “electronic communication”, it was said that such a definition could result in, for example, the use of short message services in the conduct of ODR proceedings. A proposal was made to bracket the phrase “including but not limited to ... microblogging” in order to simplify the definition.

63. That proposal was accepted, and in all other respects it was agreed to retain the language of paragraph (8) as contained in document A/CN.9/WG.III/WP.123/Add.1.

#### *Subheadings*

64. A suggestion was made to delete the subheadings “ODR”, “Parties”, and “[TBD]” in draft article 2. This suggestion did not receive support.

65. After discussion, it was agreed to replace the placeholder “[TBD]” with the heading “Neutral”, which, it was said, would distinguish a neutral from claimants and respondents, which were grouped under the subheading “Parties”.

#### 4. Draft article 3 (Communications)

66. The Working Group considered draft article 3 as contained in paragraph 8 of document A/CN.9/WG.III/WP.123/Add.1.

##### *Paragraph (1)*

67. A concern was raised that the term “electronic address” in paragraph (1) was not sufficiently clear in the context of an ODR provider, and in particular whether it referred to a website, a link, or otherwise. In that respect, a suggestion was made to replace the phrase “the electronic address” with the phrase “the electronic address or electronic contact information which identifies the ODR provider”. It was said that such a definition would ensure ODR providers were properly identified.

68. Another proposal was made to replace the entire second sentence of paragraph (1) as follows: “Electronic address means contact information by which electronic communication can be made.”

69. It was agreed to consider paragraph (1), and the remainder of draft article 3, at a later stage.

#### 5. Draft article 4A (Notice)

##### *Paragraphs (1) and (2)*

70. It was suggested that discussion on paragraphs (1) and (2) of draft article 4A should take place after further discussion on ODR platforms and ODR providers. This suggestion was accepted.

##### *Paragraph (3)*

71. After discussion, broad agreement was expressed regarding the need for a provision setting out a clear commencement stage of proceedings. It was said both that other provisions relied on commencement as a starting point, and moreover that various legal implications, including issues relating to prescription, might derive from the date of commencement.

72. It was asked whether the square-bracketed language “to be deemed”, in relation to the receipt of notice, was necessary. On the one hand, it was said that parties ought to be aware that proceedings had been initiated against them. On the other hand, it was said that the deeming language may result in ODR proceedings being commenced even when the respondent has not received the notice. It was said by way of clarification that draft article 7(5) gave the neutral the power to redress any difficulties in the receipt of a notice.

73. A suggestion was made to amend paragraph (3) in order that proceedings would only start once a respondent had submitted a response to the notice, which was said to reflect article 2 of the UNCITRAL Conciliation Rules. Specific language to that effect was proposed as follows: “ODR proceedings shall commence when the respondent submits a response pursuant to article 4B accepting the [mediation/conciliation].”

74. In response, it was said that the proposal in paragraph 73 above would mean in practice that although the parties had agreed to submit disputes to ODR, a claimant would not be able to commence a Track II procedure unless the respondent so agreed a second time. The requirement of such a second agreement was said to make Track II ineffective and therefore requiring such a second agreement was not desirable.

75. A view was expressed that Track II led only to a recommendation and was therefore non-binding and, as such, the parties could withdraw from that process at any time consistent with the UNCITRAL Model Law on International Commercial Conciliation and the UNCITRAL Conciliation Rules.

76. In response, it was said by a number of delegations that Track II was not a mediation process, but a three-stage process consisting of direct negotiation, facilitated settlement, and then a final stage, the procedural outcome of which was termed “recommendation”. It was said that the merchant could commit beforehand to be bound by the outcome of the third stage. The term “recommendation” was intended to encompass a broad range of procedural outcomes that, unlike arbitral awards, did not produce *res judicata* effect but could be

coupled with mechanisms that could ensure their effective implementation. Although a recommendation was not intended to be “final and binding” in the same sense as an arbitration award enforceable by the courts, it could still be binding by way of a panoply of different, legally relevant actions, including private enforcement mechanisms. EBay was mentioned as an example of such a system.

77. It was also said that a distinction ought to be made between binding nature of an agreement to submit disputes to an online dispute resolution process, and binding nature of a recommendation.

78. The question was raised whether it was intended under Track II that the Rules could not be used by parties who wish to agree to a purely voluntary process such as mediation and arbitration and do not wish to engage in a recommendation process.

79. It was said that the Rules as contained in document A/CN.9/WG.III/WP.123/Add.1 provided for a three-stage process including a procedural stage resulting in a recommendation. The view was further expressed that, as the Rules are contractual in nature, parties may agree to use them in a form that did not include a recommendation process, but that would be a modification of the Rules.

#### *Conclusion*

80. After discussion, it was agreed to retain the language in paragraph (3) as contained in A/CN.9/WG.III/WP.123/Add.1, but to place that language in square brackets, and furthermore to add the language proposed in paragraph 73 above in square brackets as an alternative.

#### *Paragraph (4)*

##### *Subparagraphs (a) and (b)*

81. A question was raised as to the meaning of the term “electronic address” in subparagraphs (a) and (b). It was clarified that once that term had been settled in relation to draft article 3 (see paras. 67-69) where it was used in relation to an ODR provider, its use could be reconsidered in paragraph (4).

##### *Subparagraphs (c) and (d)*

82. No objection was made to the text of subparagraphs (c) and (d) and consequently it was agreed to retain the language therein.

##### *Subparagraph (e)*

83. A question was raised as to the legal effect of subparagraph (e), and whether the inclusion of such a provision in the Rules would have a res judicata effect, or an effect in relation to limitation periods. In that respect, reference was had to article 13 of the UNCITRAL Model Law on International Commercial Conciliation, and article 16 of the UNCITRAL Conciliation Rules, both of which addressed resort to arbitral or judicial proceedings.

##### *Subparagraph (f)*

84. A question was raised in relation to the precise meaning of “location” in subparagraph (f). It was said that that meaning had not been precisely defined as a matter of physical location, relevant legal jurisdiction or otherwise. It was also pointed out that the definition of “location” had been discussed at the twenty-fourth session of the Working Group (A/CN.9/739, paras. 78-80). The Working Group decided to leave the matter open for further consideration.

##### *Subparagraph (h)*

85. It was said that the language in subparagraph (h) could be problematic insofar as the “signature” described was not clearly expressed to be an “electronic signature” in line with other UNCITRAL instruments, and specifically the UNCITRAL Model Law on Electronic Signatures. It was said that replacing the language “the signature of the claimant and/or the

claimant's representative in electronic form" with wording more aligned to that Model Law, would be more concise and create greater legal certainty.

86. A separate proposal was made in relation to that subparagraph, namely to delete the phrase "including any other identification and authentication methods". It was said in response that that wording provided a helpful expansion of the means by which a claimant might identify itself beyond an electronic signature. After discussion, it was agreed to retain that language.

*Conclusion — subparagraphs (e)-(h)*

87. After discussion, it was agreed to place square brackets around subparagraph (e), in order to consider that subparagraph further at a later stage.

88. It was also agreed to remove the square brackets and retain the text in relation to subparagraphs (f), (g) and (h), notwithstanding that some ambiguity remained in relation to the content of these subparagraphs, and that they ought to be further considered at a later stage.

89. In relation to subparagraph (h), it was further agreed that the Secretariat would provide alternative proposals for wording in relation to "electronic signature" that might be more appropriate.

*Ellipses following subparagraph (h)/Further information to be included in the notice*

90. A suggestion was made to include as a new subparagraph the words "other relevant information, if any", which, it was said, would permit parties to be able to introduce other information relevant to their claim that may not be provided for in the other headings at the time of issuing the notice.

91. It was recalled that the chapeau of draft article 4A, paragraph (4), provided for the mandatory provision of information in the subheadings, as indicated by the word "shall". It was said that the proposal in paragraph 90 above was intended to make it possible, but not mandatory, for parties to introduce other relevant information.

*Conclusion on ellipses/Further information to be included in the notice*

92. After discussion, it was agreed that it was desirable to encourage claimants to submit all relevant information to the extent possible at the time of notice, but that the provision of such information ought not to be mandatory. The Secretariat was requested to draft wording to that effect and to include it either in a separate provision, or in draft article 4A, in square brackets, for the further consideration of the Working Group.

93. It was clarified that the final ellipses in square brackets following subparagraph (h) would also be deleted.

94. In relation to the conclusions set out in paragraphs 92 and 93 above, it was agreed that parallel changes would be made as appropriate to the next iteration of draft article 4B.

## **6. Draft article 4B (Response)**

*Paragraph (1)*

95. There was no objection to the language in paragraph (1) and consequently it was agreed to retain the text therein.

*Paragraph (2)*

96. A proposal was made in relation to language addressing counterclaims as follows: "The response to an ODR notice may include one or more counterclaims provided that such counterclaims fall within the scope of the Rules and arise from the same transaction as the initial claim. A counterclaim must include the information in article 4A, paragraphs (4)(c) and (d)." It was said that that proposal would simplify the existing draft, would not require a definition of counterclaim, and would furthermore require a counterclaim to be submitted at the same time as a respondent's response.

97. That proposal received broad support.

98. A view was expressed that insufficient consideration had been given to the response to a counterclaim by a claimant. It was said that for the sake of due process, provision ought to be made in the Rules for a claimant to provide its defence were a counterclaim to be issued.

99. A different view was expressed to the effect that a specific provision need not be made for a response to a counterclaim in the Rules, both because such a provision might complicate the Rules and lead to inefficiencies in the ODR process, and because in any event a claimant could provide its response in the negotiation stage of proceedings.

100. After discussion, it was agreed that in principle, there was consensus that each party ought to have the opportunity to set forth its case. As a practical matter, it was agreed to consider a separate provision, tentatively a new article 4C, inclusive of both the proposal set out in paragraph 96 above in relation to counterclaims, as well as a new paragraph providing for a response by a claimant within a certain time frame.

*Paragraph (3)*

101. After discussion, it was agreed to add square brackets around subparagraph (d) to reflect the changes made to the similar provision in draft article 4A, paragraph (4)(e).

102. It was further agreed to delete the square brackets around subparagraphs (e) to (g), and to reflect any consequential drafting provisions required by wording proposed in draft article 4A, paragraph (4).

103. In all other respects, it was agreed that paragraph (3) would remain in the form set out in paragraph 12 of document A/CN.9/WG.III/WP.123/Add.1.

**7. Draft article 5 (Negotiation and settlement)**

104. The Working Group considered draft article 5 as contained in paragraph 13 of document A/CN.9/WG.III/WP.123/Add.1.

*General*

105. In response to a suggestion that the words “ODR provider” throughout the article be placed in square brackets, it was clarified that, further to the outcome of the deliberations of the Working Group in relation to this matter in paragraphs 48-57, the appropriate phrase would be incorporated throughout the draft Rules.

*Paragraph (1)*

106. A question was raised in relation to the meaning of communication in paragraph (1), and a suggestion made to replace that with “receipt”. It was agreed to return to that matter after consideration of draft article 3 of Track II of the Rules.

107. It was observed that, following the decision to insert a new provision in relation to counterclaims (see paras. 98-100), consequential amendments would be required in paragraph (1).

108. A suggestion was made to remove the square brackets around the term “and notification ... to the claimant”, which it was said would cater to the need for ensuring that the claimant had received the relevant communication. After discussion, it was agreed to remove those brackets and retain the text therein.

109. A further suggestion was made to remove the square brackets around the entire text of paragraph (1), on the basis that a clear commencement provision was necessary. There was support for that suggestion, and consequently it was agreed to remove those square brackets.

110. A general suggestion was made to consider that in practice, an ODR administrator (whether that be a provider or a platform), would communicate specific timelines to parties for the proceedings, and that the Working Group might wish to take comfort from the fact that parties would thus be notified of relevant deadlines in the context of proceedings. It was suggested that an indication as to that role of a provider or platform could be addressed in the guidelines.



*Paragraph (2)**“Presumed ...”*

111. A proposal was made to delete the phrase “presumed to have refused to negotiate and”, which was said to create unnecessary complexity and indeed a negative connotation where one need not exist. A second proposal was made to replace that language with the phrase “or a party elects not to engage in direct negotiations, then”. Both proposals received support, and after discussion, it was agreed to adopt the second proposal, such that paragraph (2) would read: “If the respondent does not communicate to the ODR provider a response to the notice ... within seven [7] calendar days of commencement of the ODR proceedings, or a party elects not to engage in direct negotiations, then the ODR proceedings shall automatically move ...”.

*“In accordance with the form contained in article 4B ...”*

112. Another proposal was made to delete the words “in accordance with the form contained in article 4B, paragraph (3)”, as it was said that requiring a respondent to respond in a certain form might hinder negotiations or the freedom of parties to negotiate, if, for example, the form had not been properly adhered to. In response, it was said inter alia that: (i) permitting a respondent to respond in any form would in fact require a second notice to be submitted in accordance with the proper form at a later stage in order for proceedings to continue within the system envisaged by the Rules; (ii) that pursuant to draft article 7(5), the neutral had the ability to overcome difficulties in relation to receipt of notices; (iii) parties could always negotiate outside the parameters of the ODR system, but that it was necessary to have clear wording that allowed proceedings to continue to the next stage automatically.

113. Two proposals were made to try to address the concerns raised in relation to that language. The first would include language indicating the respondent was to communicate “an article 4B response”; and the second would modify the words “a response” with the words “referred to in article 4B”.

114. After discussion, it was agreed to retain the language as drafted in paragraph 13 of document A/CN.9/WG.III/WP.123/Add.1, bearing in mind the suggestions set out in paragraph 113 and the concerns raised in paragraph 112, for future consideration.

*Paragraph (3)*

115. A proposal was made to delete the words “in accordance with article 3(8)” as that language was repetitive with the provision of draft article 3(8) itself. Another view was expressed that draft article 5 ought to retain the entire flow of the negotiation stage of proceedings, and that a cross-reference to draft article 3(8) was helpful in that respect. After discussion, it was agreed to delete the words “in accordance with article 3(8)” and to revisit paragraph (3) of draft article 5 after consideration of draft article 3.

116. A proposal was made to replace the phrase “submission of the response to the ODR platform” with “and notification of the response to the claimant”, which it was said would increase clarity and also obviate the need for the following language “[and notification thereof to the claimant], then”. After discussion, that proposal was accepted and the square bracketed language followed by the word “then”, deleted.

117. It was suggested that parties ought, at any time, to be able to elect to move to a facilitated settlement stage, without waiting for the ten days required under paragraph (3). In relation to whether parties ought to have to agree to move to the next stage, or whether one party ought to be able to do so unilaterally, it was said that the latter was more in line with current practice. In support of that view, it was said that it was not possible to impose a negotiation stage on parties and that if one party wanted to move to the next stage, it ought to be permitted to do so.

118. In that respect, a proposal was made to add a sentence at the end of paragraph (3) as follows: “At any point in time prior to the expiration of the 10 day period, a party may request that the process move to the facilitated settlement stage, in which case the ODR provider shall promptly proceed with the appointment of the neutral in accordance with article 6.” That proposal received support. A suggestion to replace the phrase “a party” with

“one or both parties” also received support, on the basis that it would also allow parties to agree to move proceedings forward. After discussion, the two proposals were accepted.

*Paragraph (4)*

119. It was proposed to delete the text “[for the filing of the response]” and to remove the square brackets from “[for reaching settlement]” and retain the text therein. After discussion, that proposal was accepted.

*Paragraph (5)*

*Form of settlement agreement and entity responsible for recording that agreement*

120. A query was raised as to the form of a settlement agreement to be recorded on the platform, and which entity was intended to record that agreement. It was said that while in a traditional mediation, the mediator would draw up the terms of an agreement in some jurisdictions, the Rules permitted a settlement to take place during the negotiation stage, when a neutral would not have been appointed yet.

*Stage of negotiations*

121. It was suggested to delete the square bracketed language “[during the negotiation stage]” as well as words “and/or” in the second set of square brackets, and to retain, and remove the square brackets around, the words “at any other stage of the ODR proceedings”. Paragraph (5) would thus read: “If settlement is reached at any stage of ODR proceedings, the terms of such settlement shall be recorded on the ODR platform, at which point, the ODR proceedings will automatically terminate.” It was said that proposal would ensure that settlement could be achieved at any stage of proceedings.

122. That proposal received broad support and was consequently accepted. Furthermore, it was agreed that the Secretariat would place that paragraph in a separate article, at a more appropriate location in the text, to reflect the principle that settlement could be achieved not only during a negotiation stage, but at any point of the proceedings.

*Confidentiality*

123. It was said that recording a settlement on the platform would raise issues of confidentiality and data preservation. In that respect, a suggestion was made to include the phrase “the information should be preserved in a secure manner” in the text. After discussion, it was agreed that such language, and its applicability to ODR platforms, providers or other actors in the ODR process, could be considered in the future for inclusion in the guidelines.

**8. Draft article 6 (Appointment of neutral)**

124. The Working Group considered draft article 6 as contained in paragraph 14 of document A/CN.9/WG.III/WP.123/Add.1.

*Subheadings*

125. After discussion, it was agreed to relocate the subheading “Objections to the appointment of a neutral” from its current location between paragraphs 4 and 5, to between paragraphs 3 and 4.

*Paragraph (1)*

*“By selection from a list ...”*

126. It was suggested to delete the square bracketed language “[by selection from a list of qualified neutrals maintained by the ODR provider]”, which was said to be overly prescriptive. It was said that ODR administrators did often maintain lists or rosters in practice, and that the guidelines might wish to address such lists. After discussion, it was agreed to delete the language in square brackets.

*Notification of “the name of the neutral appointed”*

127. A view was expressed that notifying only the name of the neutral was insufficient insofar as it would not meaningfully allow parties to challenge a neutral or determine if a conflict of interest existed. A number of suggestions were made to redress that concern, including: requesting ODR providers to publish online a list of names of available neutrals; providing for the curriculum vitae of neutrals to be sent to the parties; and providing information similar to that provided by appointing authorities under the UNCITRAL Arbitration Rules 1976 (full name, address, nationality and a description of the relevant qualifications).

128. After discussion, it was agreed that some basic information in relation to a neutral ought to be provided to the parties, but that that information ought not unduly to burden the ODR provider. It was agreed that the Secretariat would prepare appropriate language to reflect the principle that additional relevant information regarding the neutral that in addition to a neutral’s name ought to be provided as well as his or her name.

*Paragraph (2)**“Sufficient time”*

129. A suggestion was made to replace the phrase “to make available sufficient time” with the phrase “to apply appropriate diligence to enable ODR proceedings”.

130. It was said that as the Rules applied by way of agreement between the parties to the dispute, they could not bind other persons such as the neutral. Consequently, a proposal was made to replace paragraph (2) with the following language: “The neutral, by accepting appointment, shall confirm that he or she has sufficient available time to enable the ODR proceedings to be conducted in accordance with the Rules.” It was said that although that formulation still would not serve to bind the neutral, it would emphasize the importance of expediting proceedings.

131. The Working Group also recalled the language in the second model statement to article 11 set out in the Annex to the UNCITRAL Arbitration Rules 2010, which reflected a similar principle.

132. After discussion, it was decided to include the proposal set out in paragraph 130 above, and a mandate was given to the Secretariat to amend the proposed language slightly as appropriate.

*Paragraph (3)*

133. A suggestion was made to add the words “or impartiality” after the first use of the word “independence” in paragraph (3), to maintain internal consistency within that paragraph. That suggestion was accepted.

*Paragraph (4)*

134. A suggestion was made to delete the first subparagraph (i) of paragraph (4), as it was said that general principles of mediation and arbitration required reasons for challenging a mediator or arbitrator. Another view was expressed that that language ought to be retained, on the assumption that parties would have good faith reasons to challenge, whilst allowing at the time of appointment expeditious challenges to be made without giving reasons. After discussion, it was agreed that there had not been a preponderance of views to delete that subparagraph, and hence it would be retained.

*Paragraph (5)*

135. There was no objection to the wording of paragraph (5) and it was consequently agreed to retain the text therein.

*Paragraph (6)*

136. It was said that paragraph (6) did not address the principle, which was said to be industry practice, that where both parties objected to the appointment of a neutral, that that neutral ought to be replaced without any discretion by a third party such as a provider. It was

agreed that the Secretariat would include wording to that effect in the next iteration of the Rules, or alternatively in the Guidelines, as appropriate.

*Paragraph (7) and (8)*

137. There were no objections to the wording in paragraphs (7) and (8) and it was consequently agreed to retain the text therein.

**9. Draft article 6(bis) (Resignation or replacement of neutral)**

138. The Working Group considered draft article 6(bis) as contained in paragraph 17 of document A/CN.9/WG.III/WP.123/Add.1.

139. There were no objections to the wording of draft article 6(bis) and it was consequently agreed to retain the text therein.

**10. Draft Article 7 (Power of the neutral)**

*Paragraph (1)*

140. A proposal was made to delete the square bracketed language as it was previously mentioned in the draft preamble. Another concern was raised whether the phrase “as he or she considers appropriate” ought to be reconsidered due to concerns of granting too wide an authority to the neutral. After discussion, it was agreed that paragraph (1) would be retained in the form set out in paragraph 19 of document A/CN.9/WG.III/WP.123/Add.1, pending discussion at a future session.

*Paragraph (1)(bis)*

141. There was no objection to the language in paragraph (1)(bis) and consequently it was agreed to retain the text.

*Paragraph (2)*

142. A proposal was made to delete the square bracketed language as well as the words “the relevance of which shall be determined by the neutral” at the end of the first sentence as it was overly prescriptive. That proposal received wide support and was consequently accepted.

143. It was said that the Rules which apply by way of agreement between parties to the online sales transaction could not bind the ODR provider or the neutral as they are not parties to this agreement. In that light, it was suggested that the Rules would need to be restructured to ensure that those obligations are complied with by those third parties. A suggestion was made to set out those obligations in guidelines addressed to ODR providers and neutrals rather than in the Rules. In response, it was said that such obligations are frequently seen in arbitration rules and thus there is no reason why the Rules cannot provide for those obligations as obligations on such third parties. It was also recalled that at the outset of the discussion, the Working Group was invited to consider whether the Rules ought to be seen as designed for ODR providers to offer to buyers and sellers. A suggestion was made to refer to that possibility in the draft preamble. After discussion, it was decided to revisit that matter at a later stage.

*Paragraph (3)*

144. A proposal was made to remove the square brackets around and retain the word “request”, and to delete the square bracketed word “require”. This proposal received broad support and was accepted.

*Paragraph (4)*

145. It was suggested that the phrase “the dispute resolution clause that forms part of a contract” was seemingly contradictory to the phrase “agreement separate from the transaction” in draft article 1, paragraph 1(bis). The Secretariat was requested to formulate clearer language in the next iteration of the Rules. The text in paragraph (4) was otherwise retained in the form set out in document A/CN.9/WG.III/WP.123/Add.1.

*Paragraph (5)*

146. It was suggested that the square bracketed language was not necessary and that the entire provision should be simplified, such that it would read: "The neutral may, at any time after inviting the parties to express their views, extend any period of time prescribed under these Rules." For the sake of further simplification, another proposal was made as follows: "the neutral may extend any period of time prescribed under these Rules." In response, a concern was raised that the provision, as drafted, reflects a long deliberation of the Working Group and that if amended as proposed, would exclude a situation where one party did not receive notice. After discussion, it was decided that the provision would be retained in the form set out in paragraph 19(5) of A/CN.9/WG.III/WP.123/Add.1, including the square brackets, and that that matter would be revisited at a later stage.

**B. Note by the Secretariat on online dispute resolution for  
cross-border electronic commerce transactions: draft procedural rules**

**(A/CN.9/WG.III/WP.123 and add.1)**

**[Original: English]**

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## **I. Introduction**

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution (ODR) relating to cross-border electronic commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions.<sup>1</sup> At its forty-fourth (Vienna, 27 June-8 July 2011)<sup>2</sup> and forty-fifth (New York, 25 June-6 July 2012)<sup>3</sup> sessions, the Commission reaffirmed the mandate of the Working Group on ODR relating to cross-border electronic transactions, including B2B and B2C transactions.

2. At its twenty-second session (Vienna, 13-17 December 2010),<sup>4</sup> the Working Group commenced its consideration of the topic of ODR and requested that the Secretariat, subject to availability of resources, prepare draft generic procedural rules for online dispute resolution in cross-border electronic transactions (the “Rules”), including taking into account that the types of claims the Rules would address should be B2B and B2C, cross-border, low-value, high-volume transactions.<sup>5</sup> From its twenty-third (New York, 23-27 May 2011)<sup>6</sup> to twenty-sixth (Vienna, 5-9 November 2012)<sup>7</sup> sessions, the Working Group considered draft generic procedural rules as contained in documents A/CN.9/WG.III/WP.107, A/CN.9/WG.III/WP.109, A/CN.9/WG.III/WP.112 and its addendum, and A/CN.9/WG.III/WP.117 and its addendum, respectively.

3. At its twenty-sixth session, the Working Group identified that two tracks in the Rules might be required in order to accommodate jurisdictions in which agreements to arbitrate concluded prior to a dispute (“pre-dispute arbitration agreements”) are considered binding

<sup>1</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 257.

<sup>2</sup> *Ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*.

<sup>3</sup> *Ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*.

<sup>4</sup> The report on the work of the Working Group at its twenty-second session is contained in document A/CN.9/716.

<sup>5</sup> A/CN.9/716, para. 115.

<sup>6</sup> The report on the work of the Working Group at its twenty-third session is contained in document A/CN.9/721.

<sup>7</sup> The report on the work of the Working Group at its twenty-sixth session is contained in document A/CN.9/762.

on consumers, as well as jurisdictions where pre-dispute arbitration agreements are not considered binding on consumers (A/CN.9/762, paras. 13-25, and annex).

4. At its twenty-seventh session (New York, 20-24 May 2013), a number of delegations reiterated that the Working Group needed to devise a global system for online dispute resolution accommodating both jurisdictions that provided for pre-dispute arbitration agreements to be binding on consumers, and jurisdictions that did not.<sup>8</sup>

## II. Online dispute resolution for cross-border electronic transactions: draft procedural rules

### A. General remarks

#### *General framework of the ODR system*

5. The Working Group may wish to consider as a preliminary matter at its twenty-eighth session the general framework of the ODR system, including issues such as the respective roles of the ODR provider and the ODR platform (see A/CN.9/WG.III/WP.119, para. 22), the intended use if any of trustmarks or other quality seals by merchants (see A/CN.9/WG.III/WP.124), the possibility for or desirability of engagement with third parties in order to facilitate “private enforcement” of recommendations, awards or settlement agreements (see A/CN.9/WG.III/WP.124), and the nature of the relationship between an ODR provider and a merchant, including how a merchant will in practice select an ODR provider.

6. The Working Group may also wish to consider the contractual nature of the Rules. As the iterations of the Rules become more advanced, it appears possible that the “ownership” of the Rules may lie not with parties to a dispute or with merchants, but with ODR providers; that is, rather than the Rules being negotiated as a contractual document between parties, it is possible that an ODR provider will offer the Rules, or a modified version of the Rules, to merchants. Merchants will thus contract to use a certain ODR provider and the Rules of that provider. The Working Group may wish to consider whether this has implications for the Rules: for example, would such usage affect the provisions of the Rules on the scope of application? Need the governing law be specified in the Rules (Track I), or in practice will the ODR provider select the governing law that is convenient to it to apply?

7. The Working Group may also wish to consider further the relationship between the ODR provider and the merchant. For example, ought issues of independence and neutrality to be addressed in guidelines or elsewhere? The Working Group might wish to consider whether an ODR provider that is exclusively funded by a single merchant or marketplace raises particular issues that can or ought to be addressed in the context of the ODR system it is designing.

#### *Two-track implementation proposal*

8. The Working Group will recall that it was determined at its twenty-seventh session that there had not been a preponderance of views to discard the two-track system in favour of a B2B-only set of Rules (A/CN.9/769, para. 30), and that a proposal put forward in relation to a two-track system (hereafter, the “two-track implementation proposal”) had received sufficient support to be considered as a basis for future discussion (A/CN.9/769, para. 43). The language put forward under the two-track implementation proposal relates only to Track I of the Rules, and the new provisions proposed comprise a paragraph 1(a) to article 1; a new paragraph 5(a) to article 2; and an Annex.

#### *Structure of this note*

9. This note contains an annotated draft of the Rules, with each track being considered separately in order to facilitate consideration of the two discrete sets of Rules envisaged under a two-track system. Thus a draft of Track I of the Rules can be found in its entirety in document A/CN.9/WG.III/WP.123, and a draft of Track II in document A/CN.9/WG.III/WP.123/Add.1.

<sup>8</sup> A/CN.9/769, para.16.

The Working Group may wish to have regard to the annotations in relation to the Rules as set out in document A/CN.9/WG.III/WP.119 and its addendum, as that commentary largely remains applicable but has not been reproduced here.

## B. Notes on draft procedural rules

10. The preamble and articles 1-15 contained in this document pertain only to Track I of the draft Rules.

### 1. Introductory rules

#### 11. Draft preamble

*“1. The UNCITRAL online dispute resolution rules (“the Rules”) are intended for use in the context of cross-border, low-value, high-volume transactions conducted by means of electronic communication.*

*“2. The Rules are intended for use in conjunction with an online dispute resolution framework that consists of the following documents which [are attached to the Rules as an Appendix and] form part of the Rules:*

*[(a) Guidelines and minimum requirements for online dispute resolution providers;]*

*[(b) Guidelines and minimum requirements for neutrals;]*

*[(c) Substantive legal principles for resolving disputes;]*

*[(d) Cross-border enforcement mechanism;]*

*[...];*

*“[3. Any separate and supplemental [rules] [documents] must conform to the Rules.]”*

#### Remarks

12. Although the Working Group has identified online dispute resolution as being particularly relevant in addressing disputes arising out of low value, high volume transactions from its inception (see A/CN.9/716, para. 48, and A/CN.9/WG.II/WP.105, para. 4), the Working Group may wish to consider whether the meaning of “high-volume transactions” as it appears in the preamble, and specifically, whether such phrase would have meaning to the users of the Rules.

#### 13. Draft article 1 (Scope of application)

*“1. The Rules shall apply where the parties to a transaction conducted by use of electronic communications have, at the time of a transaction, explicitly agreed that disputes relating to that transaction and falling within the scope of the Rules shall be resolved under the Rules.*

*[“1a. These Rules shall not apply where one party to the transaction is a consumer from a State listed in Annex X, unless the Rules are agreed after the dispute has arisen.”]*

*[“1 bis. Explicit agreement referred to in paragraph (1) above requires agreement separate from that transaction[, and] notice in plain language to the buyer that disputes relating to the transaction and falling within the scope of the ODR Rules will be exclusively resolved through ODR proceedings under the ODR Rules [and whether Track I or Track II of the Rules apply to that dispute] (the “dispute resolution clause”).”]*

*[“2. These Rules shall only apply to claims:*

*(a) that goods sold or leased [or services rendered] were not delivered, not timely delivered, not properly charged or debited, and/or not provided in accordance with the agreement made at the time of the transaction; or*

*(b) that full payment was not received for goods [or services] provided.]*

*[“3.*



*Option 1: [“The Rules shall not apply where the applicable law at the buyer’s place of residence provides that agreements to submit a dispute within the scope of the ODR Rules are binding on the buyer only if they were made after the dispute has arisen and the buyer has not given such agreement after the dispute has arisen or confirmed such agreement which it had given at the time of the transaction.]*

*Option 2: [“These Rules shall govern the ODR proceedings except that where any of these Rules is in conflict with a provision of applicable law from which the parties cannot derogate, that provision shall prevail.]”*

#### Remarks

##### Paragraph (1)

14. The Working Group may wish to note that the phrase “resolved by ODR under the Rules” has been modified to read “resolved under the Rules”, for clarity of drafting, and as ODR is defined only in article 2 of the Rules.

##### Paragraph (1a)

15. Paragraph (1a) has been included in square brackets pursuant to the proposal made at the twenty-seventh session of the Working Group (A/CN.9/769, paras. 32 and 43). It applies only to Track I of the Rules and requires a party to a transaction to self-identify its jurisdiction and status (e.g., business or consumer). It furthermore requires the inclusion of an Annex comprising a list of jurisdictions, which would opt in to inclusion on that list in order to exclude the application of Track I of the Rules to consumers in those jurisdictions.

16. The ostensible consequence of this paragraph is that Track I of the Rules would preclude its own applicability to consumers from jurisdictions listed in the Annex, in instances where the resort to online dispute resolution under the Rules takes place before a dispute has arisen.

17. In relation to the inclusion of an Annex listing countries to which a set of UNCITRAL procedural rules would not apply, the Working Group may wish to consider the following matters:

(a) What is the proposed legal implication if a State “accedes” to the list — is it taking a legal position regarding its law on pre-dispute agreements to arbitrate, or is it expressing an indicative preference for its consumers not to be permitted to arbitrate in the context of ODR? Likewise what is the legal implication of omission — if a State does not accede to the list, is it expressing a view regarding its national law?

(b) What is the basis of the decision to accede to a list? For example, various States may have complex consumer laws that do not neatly address pre- or post-dispute agreements to arbitrate.

(c) On what legal (public international law) basis and by what mechanism could States accede to a list in a set of procedural rules and how, in practical terms, would they indicate their accession or a withdrawal thereof?

(d) How, and by whom, are requests to be made to States to self-declare? Would the period for States to self-declare be ongoing and without deadline?

(e) Which entity would compile and maintain the authoritative version of the list?

(f) Would the onus to keep merchants informed about new “accessions” to the list be on merchants themselves or on the keeper of the list? Are there foreseeable issues of liability arising from the maintenance of a list?

(g) What would be the implications for consumers if a State were to accede in the midst of an online proceeding involving that consumer? Or after that consumer had signed a contract but before a dispute had arisen?

(h) What are the practical and legal implications in the event of a modification of the contractual terms of the Rules, e.g. if the parties were to delete or modify the Annex?

(i) Would there be any scope for a consumer whose jurisdiction is on the list to agree to arbitration post-dispute?

(j) What are the legal implications if a purchaser goes down the “wrong track” — either because a consumer from a listed State is offered a Track I proceeding by a merchant, or because he mis-identifies himself as a business or consumer?

(k) Does the Working Group foresee any precedential implications for future UNCITRAL texts in including such a list?

*Paragraph (3)*

18. Should the Working Group elect to retain paragraph (1a), it may wish to delete Option 1 of paragraph (3), as that option would become redundant.

19. **Draft article 2 (Definitions)**

*“For purposes of these Rules:*

*ODR*

*“1. ‘ODR’ means online dispute resolution which is a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology.*

*“2. ‘ODR platform’ means an online dispute resolution platform which is a system for generating, sending, receiving, storing, exchanging or otherwise processing electronic communications used in ODR, and which is designated by the ODR provider in the ODR proceedings.*

*“3. ‘ODR provider’ means the online dispute resolution provider specified in the dispute resolution clause referring disputes to online dispute resolution under these Rules. An ODR provider is an entity that administers ODR proceedings [and designates an ODR platform][, whether or not it maintains an ODR platform].*

*Parties*

*“4. ‘claimant’ means any party initiating ODR proceedings under the Rules by issuing a notice.*

*“5. ‘respondent’ means any party to whom the notice is directed.*

*[TBD]*

*[“5a. ‘consumer’ means a natural person who is acting primarily for personal, family or household purposes.]*

*“6. ‘neutral’ means an individual that assists the parties in settling or resolving the dispute.*

*Communication*

*“7. ‘communication’ means any statement, declaration, demand, notice, response, submission, notification or request made by any person to whom the Rules apply in connection with ODR.*

*“8. ‘electronic communication’ means any communication made by any person to whom the Rules apply by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telecopy, short message services (SMS), web-conferences, online chats, Internet forums, or microblogging and includes any information in analogue form such as document objects, images, texts and sounds that are converted or transformed into a digital format so as to be directly processed by a computer or other electronic devices.”*

*Remarks*

*Headings*

20. The heading “Parties” may be misleading insofar as it currently includes the definition of neutral, and the square-bracketed definition of consumer; however the Rules often refer

to “parties” with the express meaning of parties to a dispute. The Working Group may wish to consider whether to define “parties” or whether to limit the terms under that heading to claimant and respondent only. A placeholder has been placed in square brackets for the consideration of the Working Group in this respect.

*Paragraph (5a)*

21. Paragraph (5a) has been included in square brackets pursuant to the two-track implementation proposal made at the twenty-seventh session of the Working Group (A/CN.9/769, paras. 32 and 43). It would be included only in Track I of the Rules (see A/CN.9/769, para. 32, and para. 8 above).

**22. Draft article 3 (Communications)**

*“1. All communications in the course of ODR proceedings shall be communicated to the ODR provider via the ODR platform designated by the ODR provider. [The electronic address of the ODR platform to which documents may be submitted shall be specified in the dispute resolution clause].*

*“2. As a condition to using the Rules each party must, [at the time it provides its explicit agreement to submit the disputes relating to the transaction to ODR under the Rules, also] provide its electronic contact information.”*

*“3. The designated electronic address of the claimant for the purpose of all communications arising under the Rules shall be that notified by the claimant to the ODR provider under paragraph (2) and as updated to the ODR provider at any time thereafter during the ODR proceedings (including by specifying an updated electronic address in the notice, if applicable).*

*“4. The electronic address for communication of the notice by the ODR provider to the respondent shall be that notified by the respondent to the ODR provider under paragraph (2) and as updated to the claimant or ODR provider at any time prior to the issuance of the notice. Thereafter, the respondent may update its electronic address by notifying the ODR provider at any time during the ODR proceedings.*

*“5. A communication shall be deemed to have been received when, following submission to the ODR provider in accordance with paragraph (1), the ODR provider notifies the parties of the availability thereof in accordance with paragraph (6). The neutral may in his or her discretion extend any deadline in the event the addressee of any communication shows good cause for failure to retrieve that communication from the platform.*

*“6. The ODR provider shall promptly communicate acknowledgements of receipt of electronic communications between the parties and the neutral to all parties [and the neutral] at their designated electronic address.*

*“7. The ODR provider shall promptly notify all parties and the neutral of the availability of any electronic communication at the ODR platform.*

*“8. The ODR provider shall promptly notify all parties and the neutral of the conclusion of the negotiation stage of proceedings and the commencement of the facilitated settlement stage of proceedings; the expiry of the facilitated settlement stage of proceedings; and, if relevant, the commencement of the arbitration stage of proceedings.*

*Remarks*

*General*

23. The Working Group may wish to note that in the interest of improving clarity, a number of square brackets have been removed, as has the possibility of parties to a dispute to provide multiple electronic addresses.

*Paragraph (1)*

24. The phrase “by electronic means” to describe how communications shall be communicated to the ODR provider has been deleted, as inconsistent with other provisions of the Rules.

*Paragraph (6)*

25. The Working Group may wish to consider whether such a provision is necessary, given that neither deadlines nor other elements of the Rules tend to be related to notification of acknowledgement of receipt.

*Paragraph (8)*

26. Paragraph (8) is a new provision included at the request of the Working Group to clarify when ODR proceedings move from one stage of proceedings to the next (A/CN.9/769, paras. 46-47, para. 84, paras. 86-87).

**2. Commencement****27. Draft article 4A (Notice)**

*“1. The claimant shall communicate to the ODR provider a notice in accordance with the form contained in paragraph (4). The notice should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.*

*“2. [The notice shall be promptly communicated by the ODR provider to the respondent.][The ODR provider shall promptly notify the respondent that the notice is available at the ODR platform.]*

*“3. ODR proceedings shall [be deemed to] commence when, following communication to the ODR provider of the notice pursuant to paragraph (1), the ODR provider notifies the parties of the availability thereof in accordance with paragraph (2).*

*“4. The notice shall include:*

*“(a) the name and designated electronic address of the claimant and of the claimant’s representative (if any) authorized to act for the claimant in the ODR proceedings;*

*“(b) the name and electronic address of the respondent and of the respondent’s representative (if any) known to the claimant;*

*“(c) the grounds on which the claim is made;*

*“(d) any solutions proposed to resolve the dispute;*

*“(e) a statement that the claimant is not currently pursuing other remedies against the respondent with regard to the specific dispute in relation to the transaction in issue;*

*[“(f) the location of the claimant];*

*“[(g) the claimant’s preferred language of proceedings;]*

*[“(h) the signature of the claimant and/or the claimant’s representative in electronic form including any other identification and authentication methods;]*

*“[...].”*

**28. Draft article 4B (Response)**

*“1. The respondent shall communicate to the ODR provider a response to the notice in accordance with the form contained in paragraph (3) within [seven (7)] calendar days of receipt of the notice. The response should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.*

“[2.

*[Option 1: The respondent may also, in response to the notice, communicate to the ODR provider via the same ODR platform in the same proceedings a claim which arises out of the same transaction identified by the claimant in the notice (‘counter-claim’).] The counter-claim shall be communicated no later than [seven (7)] calendar days [after the notice of the claimant’s claim is communicated to the ODR provider. [The counter-claim shall be dealt with in the ODR proceedings together with the claimant’s claim.]*

*[A counterclaim must include the information in article 4A, paragraphs (4)(c) and (4)(d).]”*

*[Option 2: “The respondent may, in response to the notice, communicate a counter-claim to the ODR provider. ‘Counter-claim’ means a[n independent] claim by the respondent against the claimant which arises out of the same transaction identified by the claimant in the notice [with the same ODR provider]”.] The counter-claim shall be communicated no later than [seven (7)] calendar days after the notice of the claimant’s claim is communicated to the ODR provider. The counter-claim shall be dealt with in the ODR proceedings together with the claimant’s claim.]*

*[A counterclaim must include the information in article 4A, paragraphs (4)(c) and (4)(d).]”*

“3. The response shall include:

“(a) the name and designated electronic address of the respondent and the respondent’s representative (if any) authorized to act for the respondent in the ODR proceedings;

“(b) a response to the grounds on which the claim is made, as set out in the notice;

“(c) any solutions proposed to resolve the dispute;

“(d) a statement that the respondent is not currently pursuing other remedies against the claimant with regard to the specific dispute in relation to the transaction in issue;

“[(e) the location of the respondent];

“[(f) whether it agrees with the language of proceedings provided by the claimant pursuant to article 4A, paragraph 4(g) above, or whether another language of proceedings is preferred;]

“[(g) the signature of the respondent and/or the respondent’s representative in electronic form including any other identification and authentication methods;]

“[...]”

Remarks

Paragraph (3)(b)

29. The Working Group may wish to note that the phrase “the statement and allegations” has been replaced by “the grounds on which the claim is made,” in order to provide for consistency with draft article 4A, paragraph (4)(c).

### 3. Negotiation

#### 30. Draft article 5 (Negotiation and settlement)

*Negotiation*

“1. [Upon communication of the response [and, if applicable, counter-claim] referred to in article 4B to the ODR provider[, and notification thereof to the claimant]], the parties shall attempt to settle their dispute through direct negotiation, including, where appropriate, the communication methods available on the ODR platform.]

“2. If the respondent does not communicate to the ODR provider a response to the notice in accordance with the form contained in article 4B, paragraph (3) within seven

(7) calendar days of commencement of the ODR proceedings, it is presumed to have refused to negotiate and the ODR proceedings shall automatically move to the facilitated settlement stage, at which point the ODR provider shall promptly proceed with the appointment of the neutral in accordance with article 6 (Appointment of Neutral).

“3. If the parties have not settled their dispute by negotiation within ten (10) calendar days of submission of the response to the ODR platform [and notification thereof to the claimant], then the ODR proceedings shall automatically move to the facilitated settlement stage, at which point the ODR provider shall notify the parties in accordance with article 3(8) and promptly proceed with the appointment of the neutral in accordance with article 6 (Appointment of Neutral).

“4. The parties may agree to a one-time extension of the deadline [for the filing of the response] [for reaching settlement]. However no such extension shall be for more than ten (10) calendar days.

#### Settlement

“5. If settlement is reached [during the negotiation stage] [and/or at any other stage of the ODR proceedings], the terms of such settlement shall be recorded on the ODR platform, at which point, the ODR proceedings will automatically terminate.”

#### Remarks

##### Paragraph (2)

31. The Working Group may wish to note that the timing of seven (7) calendar days has been augmented by the words “of commencement of the ODR proceedings” (itself defined in draft article 4A, paragraph (3)), in order to enhance clarity in relation to timing.

##### Paragraph (3)

32. The Working Group may wish to note that language has been inserted to reflect its request that parties be notified as proceedings move from one stage to another (see para. 26 above).

##### Paragraph (5)

33. In order to maintain consistency with the Working Group’s agreement at its twenty-seventh session that a settlement agreement must be recorded, and moreover should be recorded before proceedings ended (A/CN.9/769, para. 51), the content of the square brackets in paragraph (5) has been retained.

34. That agreement was reached in relation to the second sentence of draft article 8, paragraph (1), which contains a similar principle. At its twenty-seventh session, the Working Group considered whether that sentence of article 8(1) should be relocated (A/CN.9/769, para. 53). The Working Group may wish to consider whether draft article 5(5) can apply at any stage of the ODR proceedings (see also A/CN.9/WG.III/WP.119/Add.1, paras 11-13), and consequently whether it should form a separate provision and moreover can replace the second sentence of draft article 8(1) altogether.

## 4. Neutral

### 35. Draft article 6 (Appointment of neutral)

“1. The ODR provider shall appoint the neutral [by selection from a list of qualified neutrals maintained by the ODR provider] and shall promptly notify the parties of that appointment and the name of the neutral appointed.

“2. The neutral, by accepting appointment, shall be deemed to have undertaken to make available sufficient time to enable the ODR proceedings to be conducted and completed expeditiously in accordance with the Rules.

“3. The neutral shall, at the time of accepting his or her appointment, declare his or her independence and disclose to the ODR provider any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A neutral, from

*the time of his or her appointment and throughout the ODR proceedings, shall without delay disclose any such circumstances to the ODR provider. The ODR provider shall promptly communicate such information to the parties.*

“4. *Either party may object to the neutral’s appointment within [two (2)] calendar days (i) of the notification of appointment without giving reasons therefor; or (ii) of a fact or matter coming to its attention that is likely to give rise to justifiable doubts as to the impartiality or independence of the neutral, setting out the fact or matter giving rise to such doubts, at any time during the ODR proceedings.*

*Objections to the appointment of a neutral*

“5. *Where a party objects to the appointment of a neutral under paragraph 4(i), that neutral shall be automatically disqualified and replaced pursuant to article 6(bis). Each party shall have a maximum of [three (3)] challenges to the appointment of a neutral following each notice of appointment, following which the appointment of a neutral by the ODR provider will be final, subject to paragraph (4)(ii). Alternatively if no challenges are made within two (2) days of any notice of appointment, the appointment will become final, subject to paragraph (4)(ii).*

6. *Where a party objects to the appointment of a neutral under subparagraph 4(ii) above, the ODR provider shall make a determination within [three (3)] calendar days, regarding whether that neutral shall be replaced.*

*Objections to provision of information*

“7. *Either party may object, within three (3) calendar days of the final appointment of the neutral, to the provision by the ODR provider to the neutral of information generated during the negotiation stage. Following the expiration of this three-day period and in the absence of any objections, the ODR provider shall convey the full set of existing information on the ODR platform to the neutral.*

*Number of neutrals*

“8. *The number of neutrals shall be one.*”

*Remarks*

*General*

36. The Working Group clarified at its twenty-seventh session that it intended to consider draft article 6 separately for Track I and for Track II, as the latter track may lend itself to a more simplified or streamlined procedure for the appointment of a neutral (A/CN.9/769, para. 107). The text set out in paragraph 35 above reflects the consideration of the Working Group of draft article 6 as it relates to Track I proceedings (A/CN.9/769, para. 107).

37. The Working Group may wish to note that paragraph (4) (as contained in A/CN.9/WG.III/WP.119/Add.1) has been deleted, and paragraph (7) (as contained in A/CN.9/WG.III/WP.119/Add.1) has been relocated to a new draft article 6(bis), in order to accommodate the request of the Working Group that the resignation or replacement of a neutral be addressed in a separate article (A/CN.9/769, paras.118-119; see also A/CN.9/769 paras. 128-129).

38. The Working Group may also wish to note that headings have been added to draft article 6, with a view to promoting clarity and readability.

*Paragraph (1)*

39. Paragraph (1) has been modified to include the principle that the identity of neutrals should be made known to the parties in order that the parties could reasonably object to that neutral’s appointment (A/CN.9/769, paras. 109-110). The Working Group may wish to consider whether, if the intention is to provide a basis on which the parties could object to a neutral, a name would be sufficient in this respect.

*Paragraph (3)*

40. Paragraph (3) has been modified in accordance with the request of the Working Group to retain the obligation of ongoing disclosure, and to accord more closely with article 11 of the UNCITRAL Arbitration Rules (as revised in 2010) (A/CN.9/769, paras. 115-117).

41. The word “promptly” has been added in the final sentence in order to provide for greater consistency within the Rules.

*Paragraphs (5) and (6)*

42. As requested by the Working Group at its twenty-seventh session, paragraph (5)(bis) of article 6 as contained in A/CN.9/WG.III/WP.119/Add.1 has been split into two paragraphs, numbered (5) and (6), to improve clarity (A/CN.9/769, paras. 124-125). Paragraph (5) has been slightly modified to reflect the existence of a new draft article 6 (bis).

**43. Draft article 6 (bis) (Resignation or replacement of neutral)**

*“If the neutral resigns or otherwise has to be replaced during the course of ODR proceedings, the ODR provider through the ODR platform shall appoint a neutral to replace him or her pursuant to article 6. The ODR proceedings shall resume at the stage where the neutral that was replaced ceased to perform his or her functions.”*

*Remarks**General*

44. At its twenty-seventh session, the Working Group considered that a general provision should be included in the Rules to address resignation and replacement of neutrals (A/CN.9/769, para. 119), including in instances where neutrals wished to resign for reasons of independence and impartiality.

**45. Draft article 7 (Power of the neutral)**

*“1. Subject to the Rules [and the Guidelines and Minimum Requirements for ODR Neutrals], the neutral may conduct the ODR proceedings in such manner as he or she considers appropriate.*

*“1 bis. The neutral, in exercising his or her functions under the Rules, shall conduct the ODR proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the dispute. In doing so, the neutral shall remain at all times wholly independent and impartial and shall treat both parties equally.*

*“2. Subject to any objections under article 6, paragraph (7), the neutral shall conduct the ODR proceedings on the basis of documents submitted by the parties and any communications made by them to the ODR provider, the relevance of which shall be determined by the neutral. [The ODR proceedings shall be conducted on the basis of these materials only unless the neutral decides otherwise.]*

*“3. At any time during the proceedings the neutral may [require] [request] or allow the parties (upon such terms as to costs and otherwise as the neutral shall determine) to provide additional information, produce documents, exhibits or other evidence within such period of time as the neutral shall determine.*

*“4. The neutral shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence or validity of any agreement to refer the dispute to ODR. For that purpose, the dispute resolution clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A determination by the neutral that the contract is null shall not automatically entail the invalidity of the dispute resolution clause.*

*“5. Where it appears to the neutral that there is any doubt as to whether the respondent has received the notice under the Rules, the neutral shall make such inquiries or take such steps as he or she deems necessary to satisfy himself or herself with regard to such receipt, and in doing so may where necessary extend any time period provided for in the Rules. [As to whether any party has received any other*



*communication in the course of the ODR proceedings, the neutral may make such inquiries or take such steps as he or she deems necessary to satisfy himself or herself with regard to such receipt, and in doing so, may, where necessary, extend any time period provided for in the Rules].”*

*Remarks*

46. The Working Group may wish to note that in the interest of improving clarity, a number of square brackets have been removed.

*Paragraph (2)*

47. In order to maintain consistency with article 27(4) of the UNCTRAL Arbitration Rules 2010, the Working Group may wish to consider whether in addition to determining relevance, the neutral ought also to determine admissibility, materiality and weight of the evidence in question.

*Paragraph (3)*

48. The Working Group may wish to consider whether paragraph (3) is necessary, particularly given the broad discretion the neutral is granted by virtue of paragraph (1).

## 5. Facilitated settlement

### 49. Draft article 8 (Facilitated settlement)

*“1. The neutral shall communicate with the parties to attempt to reach an agreement (“facilitated settlement”). If the parties reach a settlement agreement, then such settlement agreement shall be recorded on the ODR platform, at which point, the ODR proceedings will automatically terminate.”*

*“2. If the parties have not settled their dispute by facilitated settlement within ten (10) calendar days of notification of the appointment of the neutral pursuant to article 6(1) (the “expiry of the facilitated settlement stage”), the ODR proceedings shall move to the final stage of proceedings pursuant to article 9, and the provider shall promptly notify the parties pursuant to article 3(8) that they have moved from the consensual stage of proceedings to the binding arbitration stage.”*

*Remarks*

*Paragraph (1)*

50. The Working Group may wish to consider, bearing in mind its previous discussions indicating that the second sentence of paragraph (1) might require relocation, and having regard to the contents of draft article 5(5), whether the second sentence of paragraph (1) could be deleted (A/CN.9/769, para. 53; see also paragraph 34 above).

*Paragraph (2)*

51. Paragraph (2) has been modified to reflect the agreement of the Working Group that the transition from a facilitated settlement stage of proceedings to an arbitration stage should be more clearly notified to the parties (A/CN.9/769, paras. 46-50), and that the expiry of the facilitated settlement stage should be linked to the notification to the parties of the neutral, rather than to the appointment of the neutral itself (A/CN.9/769, para. 54). The Working Group may wish to consider whether the language it proposed at its twenty-seventh session for insertion at the end of paragraph (2), *“and the provider shall promptly notify the parties pursuant to article 3(8) that they have moved from the consensual stage of proceedings to the binding arbitration stage”* (A/CN.9/769, para. 48), could be further simplified.

## 6. Arbitration

### 52. Draft article 9 (Arbitration)

*“1. The neutral shall, at the expiry of the facilitated settlement stage, proceed to communicate a date to the parties for final submissions to be made. Such date shall be*

*not later than ten (10) calendar days from the notification to the parties of the expiry of the facilitated settlement stage.*

*“2. Each party shall have the burden of proving the facts relied on to support its claim or defence. The neutral shall have the discretion to reverse such burden of proof where, in exceptional circumstances, the facts of the ODR proceedings so require.*

*“3. The neutral shall evaluate the dispute based on the information submitted by the parties and shall render an award. The ODR provider shall communicate the award to the parties and the award shall be recorded on the ODR platform.*

*“4. The award shall be made in writing and signed by the neutral, and shall indicate the date on which it was made and the place of arbitration.*

*“4 bis. The requirement in paragraph (3) for:*

*(a) the award to be in writing shall be met where the information contained in the award is accessible so as to be usable for subsequent reference; and*

*(b) the award to be signed shall be met where data is used to identify the neutral and to indicate his or her approval of the information contained in the award.*

*“5. The award shall state brief grounds upon which it is based.*

*“6. The award shall be rendered promptly, preferably within ten calendar days [from a specified point in proceedings].*

*“6. bis. An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.*

*“7. The award shall be final and binding on the parties. The parties shall carry out the award without delay.*

*“8. In all cases, the neutral shall decide [ex aequo et bono], in accordance with the terms of the contract, taking into consideration any relevant facts and circumstances[, and shall take into account any usage of trade applicable to the transaction].”*

#### *Remarks*

##### *Paragraph (1)*

53. At its twenty-seventh session the Working Group agreed that timeframes for the submissions referred to in paragraph (1) should follow from the notification to parties of the appointment of the neutral (A/CN.9/769, paras. 85-86). The Working Group may wish to note that the term “expiry of the facilitated settlement stage” has been defined in draft article 8 as the failure to settle within ten (10) calendar days of being notified of the appointment of the neutral pursuant to article 6(1) (see para. 51 above). The Working Group may wish to consider whether this timeline is sufficiently clear.

##### *Paragraph (4)(bis)*

54. The Working Group requested at its twenty-seventh session that the Secretariat clarify when notifications to the parties, or specific documents must be made “in writing” (A/CN.9/769, para. 87). However in light of the nature of online dispute resolution, in which the proceedings take place entirely within the online environment, and the general trend in UNCITRAL instruments to move away from creating restrictions in relation to “writing” (see e.g. Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by UNCITRAL on 7 July 2006), no additional insertions have been made to the Rules in this respect.

55. Thus the only time that “writing” is mentioned or defined in the Rules is in draft article 9, paragraph (4)(bis), in relation to the requirements of an award.

*Paragraph (8)*

56. Further to the discussion of the Working Group at its twenty-seventh session, the term “ex aequo et bono” has been placed in square brackets, pending alternative suggestions.

57. **[Draft article 9 (bis) Correction of award**

*“Within [five (5)] calendar days after the receipt of the award, a party, with notice to the other party, may request the neutral to correct in the award any error in computation, any clerical or typographical error, [or any error or omission of a similar nature]. If the neutral considers that the request is justified, he or she shall make the correction [including a brief statement of reasons therefor] within [two (2)] calendar days of receipt of the request. Such corrections [shall be recorded on the ODR platform and] shall form part of the award. [The neutral may within [five (5)] calendar days after the communication of the award make such corrections on its own initiative.]”*

58. **Draft article 9 (ter) Internal review mechanism**

*“[1. Either party may request annulment of the award within ten (10) calendar days of the communication of the award, by application to the ODR provider via the ODR platform, on the grounds that (a) the place of arbitration unfairly prejudiced that party; or (b) there has been a serious departure from a fundamental rule of procedure prejudicing that party’s right to due process.]*

*“[2. The ODR provider shall appoint a neutral (i) unaffiliated with the ODR proceedings the subject of the request, and (ii) from the list of qualified neutrals maintained by the ODR provider [or belonging to other arbitral institutions], to assess the request within five (5) calendar days. Once the neutral is appointed, the ODR provider shall notify the parties of such appointment.*

*“[3. That neutral shall render a final decision on the request for annulment within seven (7) calendar days of his or her appointment. If the award is annulled the ODR proceedings shall, at the request of either party, be submitted to a new neutral appointed in accordance with article 6.]”*

59. **Draft article 10 (Place of proceedings)**

*“[The ODR provider shall select the place of proceedings, such place to be selected from among the list set out in the Appendix to [Track I of] these Rules.]”*

**7. General provisions**

60. **Draft article 11 (ODR provider)**

*“[The ODR provider shall be specified in the dispute resolution clause.]”*

61. **Draft article 12 (Language of proceedings)**

*“[1. Subject to an agreement by the parties, the neutral shall, promptly after its appointment, determine the language or languages to be used in the proceedings[, having regard to the parties’ due process rights under article [x]].*

*“2. All communications, with the exception of any communications falling under paragraph (3) below, shall be submitted in the language of the proceedings (as agreed or determined in accordance with this article), and where there is more than one language of proceedings, in one of those languages.*

*“3. Any documents attached to the communications and any supplementary documents or exhibits submitted in the course of the ODR proceedings may be submitted in their original language, provided that their content is undisputed.*

*“4. When a claim relies on a document or exhibit whose content is disputed, the neutral may order the party serving the document or exhibit to provide a translation of that document into [a language which the other party understands] [the other language of the proceedings] [failing which, the language the other party included in its notice or response as its preferred language].”*

62. **Draft article 13 (Representation)**

*“A party may be represented or assisted by a person or persons chosen by that party. The names and designated electronic addresses of such persons [and the authority to act] must be communicated to the other party by the ODR provider.”*

63. **Draft article 14 (Exclusion of liability)**

*“[Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the ODR provider and neutral based on any act or omission in connection with the ODR proceedings under the Rules.]”*

64. **Draft article 15 (Costs)**

*“[The neutral shall make no [decision] [award] as to costs and each party shall bear its own costs.]”*

65. **[Annex X**

*[list of jurisdictions which would opt in to inclusion in such an Annex]*

*Remarks*

66. The Annex component of the “two-track implementation proposal” put forward at the twenty-seventh session of the Working Group is addressed further at paragraph 17 above.

67. As a matter of style, the Working Group may wish to consider how an Annex will function alongside the Appendices envisaged in the preamble, and whether these two types of documents ought to be further differentiated in some way.

## (A/CN.9/WG.III/WP.123/add.1) (Original: English)

**Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules**

## ADDENDUM

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**II. Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules****A. General remarks**

1. This addendum contains a draft of Track II of the Rules. As noted at paragraph 9 of document A/CN.9/WG.III/WP.123, the Working Group may also wish to have regard to the annotations in relation to the Rules as set out in documents A/CN.9/WG.III/WP.119 and its addendum, as that commentary largely remains applicable but has not been reproduced here. Likewise commentary relating to articles common to both Track I and Track II set out in document A/CN.9/WG.III/WP.123 has not been reproduced here.

2. The Working Group may wish to consider whether any provisions in Track II might be simplified or streamlined given the absence of an arbitration stage in this track and the greater flexibility that might entail.

**B. Notes on draft procedural rules**

3. The following preamble and articles 1-13 contained in this document A/CN.9/WG.III/WP.123/Add.1 pertain only to Track II of the draft Rules.

**1. Introductory rules****4. Draft preamble**

*“1. The UNCITRAL online dispute resolution rules (“the Rules”) are intended for use in the context of cross-border low-value, high-volume transactions conducted by means of electronic communication.*

*“2. The Rules are intended for use in conjunction with an online dispute resolution framework that consists of the following documents which [are attached to the Rules as an Appendix and] form part of the Rules:*

*[(a) Guidelines and minimum requirements for online dispute resolution providers;]*

*[(b) Guidelines and minimum requirements for neutrals;]*

*[(c) Substantive legal principles for resolving disputes;]*

*[(d) Cross-border enforcement mechanism;]*

*[...];*

*“[3. Any separate and supplemental [rules] [documents] must conform to the Rules.]”*

**5. Draft article 1 (Scope of application)**

*“1. The Rules shall apply where the parties to a transaction conducted by use of electronic communications have, at the time of a transaction, explicitly agreed that disputes relating to that transaction and falling within the scope of the Rules shall be resolved under the Rules.*

*“[1 bis. Explicit agreement referred to in paragraph (1) above requires agreement separate from that transaction[, and] notice in plain language to the buyer that disputes relating to the transaction and falling within the scope of the ODR Rules will be exclusively resolved through ODR proceedings under the ODR Rules [and whether Track I or Track II of the Rules apply to that dispute] (the “dispute resolution clause”).*

*“2. These Rules shall only apply to claims:*

*(a) that goods sold or leased [or services rendered] were not delivered, not timely delivered, not properly charged or debited, and/or not provided in accordance with the agreement made at the time of the transaction; or*

*(b) that full payment was not received for goods [or services] provided.]*

*“3. These Rules shall govern the ODR proceedings except that where any of these Rules is in conflict with a provision of applicable law from which the parties cannot derogate, that provision shall prevail.]”*

*Remarks*

*Paragraph (3)*

6. The Working Group may wish to note that option 1 of paragraph (3) as contained in para. 26 of document A/CN.9/WG.III/WP.119 has been deleted, as it does not apply to Track II of the Rules.

**7. Draft article 2 (Definitions)**

*“For purposes of these Rules:*

*ODR*

*“1. ‘ODR’ means online dispute resolution which is a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology.*

*“2. ‘ODR platform’ means an online dispute resolution platform which is a system for generating, sending, receiving, storing, exchanging or otherwise processing electronic communications used in ODR, and which is designated by the ODR provider in the ODR proceedings.*

*“3. ‘ODR provider’ means the online dispute resolution provider specified in the dispute resolution clause referring disputes to online dispute resolution under these Rules. An ODR provider is an entity that administers ODR proceedings [and designates an ODR platform][, whether or not it maintains an ODR platform].*

*Parties*

*“4. ‘Claimant’ means any party initiating ODR proceedings under the Rules by issuing a notice.*

*“5. ‘Respondent’ means any party to whom the notice is directed.*

*[TBD]*

“6. ‘Neutral’ means an individual that assists the parties in settling or resolving the dispute.

*Communication*

“7. ‘Communication’ means any statement, declaration, demand, notice, response, submission, notification or request made by any person to whom the Rules apply in connection with ODR.

“8. ‘Electronic communication’ means any communication made by any person to whom the Rules apply by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telecopy, short message services (SMS), web-conferences, online chats, Internet forums, or microblogging and includes any information in analogue form such as document objects, images, texts and sounds that are converted or transformed into a digital format so as to be directly processed by a computer or other electronic devices.”

**8. Draft article 3 (Communications)**

“1. All communications in the course of ODR proceedings shall be communicated to the ODR provider via the ODR platform designated by the ODR provider. [The electronic address of the ODR platform to which documents may be submitted shall be specified in the dispute resolution clause].

“2. As a condition to using the Rules each party must, [at the time it provides its explicit agreement to submit the disputes relating to the transaction to ODR under the Rules, also] provide its electronic contact information.”

“3. The designated electronic address of the claimant for the purpose of all communications arising under the Rules shall be that notified by the claimant to the ODR provider under paragraph (2) and as updated to the ODR provider at any time thereafter during the ODR proceedings (including by specifying an updated electronic address in the notice, if applicable).

“4. The electronic address for communication of the notice by the ODR provider to the respondent shall be that notified by the respondent to the ODR provider under paragraph (2) and as updated to the claimant or ODR provider at any time prior to the issuance of the notice. Thereafter, the respondent may update its electronic address by notifying the ODR provider at any time during the ODR proceedings.

“5. A communication shall be deemed to have been received when, following submission to the ODR provider in accordance with paragraph (1), the ODR provider notifies the parties of the availability thereof in accordance with paragraph (6). The neutral may in his or her discretion extend any deadline in the event the addressee of any communication shows good cause for failure to retrieve that communication from the platform.

“6. The ODR provider shall promptly communicate acknowledgements of receipt of electronic communications between the parties and the neutral to all parties [and the neutral] at their designated electronic address.

“7. The ODR provider shall promptly notify all parties and the neutral of the availability of any electronic communication at the ODR platform.

“8. The ODR provider shall promptly notify all parties and the neutral of the conclusion of the negotiation stage of proceedings and the commencement of the facilitated settlement stage of proceedings; the expiry of the facilitated settlement stage of proceedings; and, if relevant, the commencement of the recommendation stage of proceedings.”

*Remarks*

*Paragraph (8)*

9. At its twenty-seventh session, the Working Group agreed to proceed on the basis that the final outcome of a Track II proceeding would be the rendering of a non-binding

recommendation by a neutral (A/CN.9/769, para. 56) (although it was also acknowledged that discussions in relation to draft article 8 were necessarily linked with those in relation to draft article 8(bis)).

10. The Working Group moreover requested that the Rules provide for more clarity when ODR proceedings move from one stage of proceedings to the next; although this was specifically requested in relation to the various stages of Track I proceedings, the Working Group may wish to consider whether a parallel provision should be included in Track II proceedings, and consequently paragraph (8) has been inserted for the consideration of the Working Group (see A/CN.9/769, paras. 46-47, para. 84, paras. 86-87).

## 2. Commencement

### 11. Draft article 4A (Notice)

*“1. The claimant shall communicate to the ODR provider a notice in accordance with the form contained in paragraph (4). The notice should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.*

*“2. [The notice shall be promptly communicated by the ODR provider to the respondent.][The ODR provider shall promptly notify the respondent that the notice is available at the ODR platform.]*

*“3. ODR proceedings shall [be deemed to] commence when, following communication to the ODR provider of the notice pursuant to paragraph (1), the ODR provider notifies the parties of the availability thereof in accordance with paragraph (2).*

*“4. The notice shall include:*

*“(a) the name and designated electronic address of the claimant and of the claimant’s representative (if any) authorized to act for the claimant in the ODR proceedings;*

*“(b) the name and electronic address of the respondent and of the respondent’s representative (if any) known to the claimant;*

*“(c) the grounds on which the claim is made;*

*“(d) any solutions proposed to resolve the dispute;*

*“(e) a statement that the claimant is not currently pursuing other remedies against the respondent with regard to the specific dispute in relation to the transaction in issue;*

*“[(f) the location of the claimant];*

*“[(g) the claimant’s preferred language of proceedings;]*

*“[(h) the signature of the claimant and/or the claimant’s representative in electronic form including any other identification and authentication methods;]*

*“[...].”*

### 12. Draft article 4B (Response)

*“1. The respondent shall communicate to the ODR provider a response to the notice in accordance with the form contained in paragraph (3) within [seven (7)] calendar days of receipt of the notice. The response should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.*

*“[2.*

*[Option 1: The respondent may also, in response to the notice, communicate to the ODR provider via the same ODR platform in the same proceedings a claim which arises out of the same transaction identified by the claimant in the notice (‘counterclaim’).] The counterclaim shall be communicated no later than [seven (7)] calendar days [after the notice of the claimant’s claim is communicated to the ODR provider. [The counterclaim shall be dealt with in the ODR proceedings together with the claimant’s claim.]*



*[A counterclaim must include the information in article 4A, paragraphs (4)(c) and (4)(d).]*

*[Option 2: “The respondent may, in response to the notice, communicate a counterclaim to the ODR provider. ‘Counterclaim’ means a[n independent] claim by the respondent against the claimant which arises out of the same transaction identified by the claimant in the notice [with the same ODR provider].”] The counterclaim shall be communicated no later than [seven (7)] calendar days after the notice of the claimant’s claim is communicated to the ODR provider. The counterclaim shall be dealt with in the ODR proceedings together with the claimant’s claim.]*

*[A counterclaim must include the information in article 4A, paragraphs (4)(c) and (4)(d).]*

*“3. The response shall include:*

*“(a) the name and designated electronic address of the respondent and the respondent’s representative (if any) authorized to act for the respondent in the ODR proceedings;*

*“(b) a response to the grounds on which the claim is made;*

*“(c) any solutions proposed to resolve the dispute;*

*“(d) a statement that the respondent is not currently pursuing other remedies against the claimant with regard to the specific dispute in relation to the transaction in issue;*

*“[(e) the location of the respondent;]*

*“[(f) whether it agrees with the language of proceedings provided by the claimant pursuant to article 4A, paragraph 4(g) above, or whether another language of proceedings is preferred;]*

*“[(g) the signature of the respondent and/or the respondent’s representative in electronic form including any other identification and authentication methods;]*

*“[...]*

### **3. Negotiation**

#### **13. Draft article 5 (Negotiation and settlement)**

*Negotiation*

*“1. [Upon communication of the response [and, if applicable, counterclaim] referred to in article 4B to the ODR provider[, and notification thereof to the claimant], the parties shall attempt to settle their dispute through direct negotiation, including, where appropriate, the communication methods available on the ODR platform.]*

*“2. If the respondent does not communicate to the ODR provider a response to the notice in accordance with the form contained in article 4B, paragraph (3) within seven (7) calendar days of commencement of the ODR proceedings, it is presumed to have refused to negotiate and the ODR proceedings shall automatically move to the facilitated settlement stage, at which point the ODR provider shall promptly proceed with the appointment of the neutral in accordance with article 6 (Appointment of Neutral).*

*“3. If the parties have not settled their dispute by negotiation within ten (10) calendar days of submission of the response to the ODR platform [and notification thereof to the claimant], then the ODR proceedings shall automatically move to the facilitated settlement stage, at which point the ODR provider shall notify the parties in accordance with article 3(8) and promptly proceed with the appointment of the neutral in accordance with article 6 (Appointment of Neutral).*

*“4. The parties may agree to a one-time extension of the deadline [for the filing of the response] [for reaching settlement]. However no such extension shall be for more than ten (10) calendar days.*

*Settlement*

“5. If settlement is reached [during the negotiation stage] [and/or at any other stage of the ODR proceedings], the terms of such settlement shall be recorded on the ODR platform, at which point, the ODR proceedings will automatically terminate.”

**4. Neutral****14. Draft article 6 (Appointment of neutral)**

“1. The ODR provider shall appoint the neutral [by selection from a list of qualified neutrals maintained by the ODR provider] and shall promptly notify the parties of that appointment and the name of the neutral appointed.

“2. The neutral, by accepting appointment, shall be deemed to have undertaken to make available sufficient time to enable the ODR proceedings to be conducted and completed expeditiously in accordance with the Rules.

“3. The neutral shall, at the time of accepting his or her appointment, declare his or her independence and disclose to the ODR provider any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A neutral, from the time of his or her appointment and throughout the ODR proceedings, shall without delay disclose any such circumstances to the ODR provider. The ODR provider shall promptly communicate such information to the parties.

“4. Either party may object to the neutral’s appointment within [two (2)] calendar days (i) of the notification of appointment without giving reasons therefor; or (ii) of a fact or matter coming to its attention that is likely to give rise to justifiable doubts as to the impartiality or independence of the neutral, setting out the fact or matter giving rise to such doubts, at any time during the ODR proceedings.

*Objections to the appointment of a neutral*

“5. Where a party objects to the appointment of a neutral under paragraph (4)(i), that neutral shall be automatically disqualified and another appointed in his or her place by the ODR provider. Each party shall have a maximum of [three (3)] challenges to the appointment of a neutral following each notice of appointment, following which the appointment of a neutral by the ODR provider will be final, subject to paragraph (4)(ii). Alternatively if no challenges are made within two (2) days of any notice of appointment, the appointment will become final, subject to (4)(ii).

“6. Where a party objects to the appointment of a neutral under paragraph 4(ii), the ODR provider shall make a determination within [three (3)] calendar days, regarding whether that neutral shall be replaced.

*Objections to provision of information*

“7. Either party may object, within three (3) calendar days of the final appointment of the neutral, to the provision by the ODR provider to the neutral of information generated during the negotiation stage. Following the expiration of this three-day period and in the absence of any objections, the ODR provider shall convey the full set of existing information on the ODR platform to the neutral.

*Number of neutrals*

“8. The number of neutrals shall be one.”

*Remarks**General*

15. The Working Group clarified at its twenty-seventh session that it intended to consider draft article 6 separately for Track I and for Track II, as the latter track may lend itself to a more simplified or streamlined approach for the appointment of a neutral (A/CN.9/769, para. 107).

16. The draft text set out in paragraph 14 above currently reflects the text considered by the Working Group in relation to Track I. The Working Group may wish to consider how

this might be simplified in relation to Track II, and in particular, whether challenges to the appointment of a neutral would be required or desirable in a Track II proceeding.

**17. [Draft article 6 (bis) (Resignation or replacement of neutral)]**

*“If the neutral resigns or otherwise has to be replaced during the course of ODR proceedings, the ODR provider through the ODR platform shall appoint a neutral to replace him or her pursuant to article 6. The ODR proceedings shall resume at the stage where the neutral that was replaced ceased to perform his or her functions.”*

18. The Working Group may wish to consider that even should a streamlined article 6 be proposed in relation to Track II, a separate provision on resignation or replacement of neutral may still be required.

**19. Draft article 7 (Power of the neutral)**

*“1. Subject to the Rules [and the Guidelines and Minimum Requirements for ODR Neutrals], the neutral may conduct the ODR proceedings in such manner as he or she considers appropriate.*

*“1 bis. The neutral, in exercising his or her functions under the Rules, shall conduct the ODR proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the dispute. In doing so, the neutral shall remain at all times wholly independent and impartial and shall treat both parties equally.*

*“2. Subject to any objections under article 6, paragraph (7), the neutral shall conduct the ODR proceedings on the basis of documents submitted by the parties and any communications made by them to the ODR provider, the relevance of which shall be determined by the neutral. [The ODR proceedings shall be conducted on the basis of these materials only unless the neutral decides otherwise.]*

*“3. At any time during the proceedings the neutral may [require] [request] or allow the parties (upon such terms as to costs and otherwise as the neutral shall determine) to provide additional information, produce documents, exhibits or other evidence within such period of time as the neutral shall determine.*

*“4. The neutral shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence or validity of any agreement to refer the dispute to ODR. For that purpose, the dispute resolution clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A determination by the neutral that the contract is null shall not automatically entail the invalidity of the dispute resolution clause.*

*“5. Where it appears to the neutral that there is any doubt as to whether the respondent has received the notice under the Rules, the neutral shall make such inquiries or take such steps as he or she deems necessary to satisfy himself or herself with regard to such receipt, and in doing so may where necessary extend any time period provided for in the Rules. [As to whether any party has received any other communication in the course of the ODR proceedings, the neutral may make such inquiries or take such steps as he or she deems necessary to satisfy himself or herself with regard to such receipt, and in doing so, may, where necessary, extend any time period provided for in the Rules.”*

**5. Facilitated settlement**

**20. Draft article 8 (Facilitated settlement)**

*“1. The neutral shall communicate with the parties to attempt to reach an agreement (“facilitated settlement”). If the parties reach a settlement agreement, then such settlement agreement shall be recorded on the ODR platform, at which point, the ODR proceedings will automatically terminate.”*

*“2. If the parties have not settled their dispute by facilitated settlement within ten (10) calendar days of being notified of the appointment of the neutral pursuant to article 6(1) (the “expiry of the facilitated settlement stage”), the ODR proceedings*

*shall move to the final stage of proceedings pursuant to article 8(bis) and the parties shall be notified accordingly pursuant to article 3(8).*

**21. Draft article 8(bis) (Recommendation by a neutral)**

*“1. The neutral shall at the expiry of the facilitated settlement stage proceed to communicate a date to the parties for final submissions to be made. Such date shall be not later than ten (10) calendar days from the expiry of the facilitated settlement stage.*

*“2. Each party shall have the burden of proving the facts relied on to support its claim or defence. The neutral shall have the discretion to reverse such burden of proof where, in exceptional circumstances, the facts so require.*

*“3. The neutral shall evaluate the dispute based on the information submitted by the parties and on the terms of the contract and shall make a recommendation. The ODR provider shall communicate that recommendation to the parties and the recommendation shall be recorded on the ODR platform.*

*“4. The recommendation shall not be binding on the parties unless they otherwise agree. However, the parties are encouraged to abide by the recommendation and the ODR provider may introduce the use of trustmarks or other methods to identify compliance with recommendations.”*

*Remarks*

*General*

22. The Working Group agreed at its twenty-seventh session to describe the non-binding determination to be made by a neutral under draft article 8(bis) as a “recommendation” (A/CN.9/769, para. 58). The terminology in that article, has been amended accordingly.

23. Draft article 8(bis) is currently located under the more general heading “facilitated settlement”. The Working Group may wish to consider whether a separate heading is warranted in relation to this draft article.

*Paragraph (1)*

24. The Working Group may wish to note that the term “expiry of the facilitated settlement stage” has been defined in draft article 8 as the failure to settle within of ten (10) calendar days of being notified of the appointment of the neutral pursuant to article 6(1). The Working Group may wish to consider whether this timeline is sufficiently clear.

*Paragraph (4)*

25. The Working Group may wish to consider whether the second sentence of paragraph (4) provides sufficiently helpful clarification to the parties to a dispute, a neutral or an ODR provider such that it should be retained, or whether it could be better placed in guidelines for ODR providers and neutrals.

**6. General provisions**

**26. Draft article 9 (ODR provider)**

*“[The ODR provider shall be specified in the dispute resolution clause.]”*

**27. Draft article 10 (Language of proceedings)**

*“[1. Subject to an agreement by the parties, the neutral shall, promptly after its appointment, determine the language or languages to be used in the proceedings[, having regard to the parties’ due process rights under article [x]].*

*“2. All communications, with the exception of any communications falling under paragraph (3) below, shall be submitted in the language of the proceedings (as agreed or determined in accordance with this article), and where there is more than one language of proceedings, in one of those languages.*

*“3. Any documents attached to the communications and any supplementary documents or exhibits submitted in the course of the ODR proceedings may be submitted in their original language, provided that their content is undisputed.*

*“4. When a claim relies on a document or exhibit whose content is disputed, the neutral may order the party serving the document or exhibit to provide a translation of that document into [a language which the other party understands] [the other language of the proceedings] [failing which, the language the other party included in its notice or response as its preferred language].”*

**28. Draft article 11 (Representation)**

*“A party may be represented or assisted by a person or persons chosen by that party. The names and designated electronic addresses of such persons [and the authority to act] must be communicated to the other party by the ODR provider.”*

**29. Draft article 12 (Exclusion of liability)**

*“[Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the ODR provider and neutral based on any act or omission in connection with the ODR proceedings under the Rules.]”*

**30. Draft article 13 (Costs)**

*“[The neutral shall make no [decision] [award] as to costs and each party shall bear its own costs.]”*

**C. Note by the Secretariat on online dispute resolution for cross-border  
electronic commerce transactions: overview of private  
enforcement mechanisms**

**(A/CN.9/WG.III/WP.124)**

**[Original: English]**

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## I. Introduction

1. At its twenty-sixth session, the Working Group agreed to proceed with its development of draft procedural rules for online dispute resolution (ODR) on the basis of a two-track system, one track of which would end in binding arbitration, and one that would not.<sup>1</sup> In relation to the latter track (Track II), one of two options presented for the consideration of the Working Group, under a proposed draft article 8(bis), was for that track to end in a non-binding “recommendation” by the neutral, on which basis the Working Group agreed to proceed.<sup>2</sup>

2. At its twenty-seventh session, the Working Group requested the Secretariat, in relation to a possible recommendation to be made by the neutral under article 8(bis) of Track II, to provide a document setting out an overview of private enforcement mechanisms.<sup>3</sup>

3. The Working Group may also wish to recall that at its twenty-second session, albeit in the context of arbitral awards arising out of ODR procedures, it considered that a need existed to address mechanisms that were simpler than the enforcement mechanism provided by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), given the need for a practical and expeditious mechanism in the context of low-value, high-volume transactions.<sup>4</sup> The Working Group in that context suggested the use of trustmarks, and the possibility of requiring the certification of merchants, who would undertake to comply with ODR decisions rendered against them. The use of statistics indicating compliance with awards was also said at that session to be a mechanism that could contribute to compliance.<sup>5</sup>

### *Meaning of private enforcement mechanisms*

4. The precise nature and meaning of “private enforcement mechanisms” has not been discussed by the Working Group and, in the absence of such guidance, this note thus considers that term to mean an alternative to a court-enforced arbitration award or settlement agreement, and which can either (i) create incentives to perform or (ii) provide for the automatic execution of the outcome of proceedings. These two broad categories are further elaborated below.

5. Moreover, the Working Group may wish to note that the word “enforcement”, which implies that a decision of some kind has been issued and that a mechanism exists to provide enforcement thereof, might not be appropriate in the context of these two categories. Rather, private mechanisms of the nature set out in this note tend to seek to encourage compliance

<sup>1</sup> A/CN.9/762, para. 18.

<sup>2</sup> A/CN.9/769, paras.56 and 58.

<sup>3</sup> A/CN.9/769, para. 57.

<sup>4</sup> A/CN.9/716, paras.43 and 98; see also A/CN.9/WG.II/WP.110, para.48.

<sup>5</sup> A/CN.9/716, para.98.

with decisions, or to provide an execution mechanism for a decision that may itself be subject to enforcement in national courts (for example in the case of a settlement agreement, non-binding decision or arbitral award).

6. Finally this note does not intend to provide an exhaustive list of private enforcement mechanisms, but rather to highlight some of the most prominent, based inter alia on seminal research works in the field,<sup>6</sup> and consultations with academics and practitioners. It does not address, for example, mechanisms such as clearinghouses or judgment funds.

*Means by which private enforcement mechanisms might be utilized*

7. The specific request of the Working Group at its twenty-seventh session was for the Secretariat to provide a document setting out an overview of private enforcement mechanisms. That request was made in the context of a non-binding recommendation to be made by the neutral under draft article 8(bis) of Track II of the Rules.<sup>7</sup>

8. However, and recalling its discussions at its twenty-second session, the Working Group may wish to consider the broader context in which private enforcement mechanisms could be employed as ancillary mechanisms, or as part of, the ODR Rules under preparation by the Working Group: that is, whether in addition to recommendations made by a neutral under draft article 8(bis) of Track II, private enforcement mechanisms could also be used to encourage compliance with settlement agreements arising out of a mediation or facilitated settlement stage, and with arbitral awards. This note also sets out certain examples of where the Working Group may wish to consider whether the ODR Rules themselves might be modified to adapt to existing enforcement mechanisms.

9. The Rules do not currently provide for private mechanisms to be incorporated into the Rules as part of the ODR proceedings. Rather, paragraph (2)(d) of the draft preamble to the Rules foresees a separate Appendix in relation to cross-border enforcement mechanisms. There are, as this note sets out, a number of different such mechanisms, the utility or appropriateness of which may differ according to circumstance and region. Largely these mechanisms are dependent on third parties (for example, credit card companies, in the case of chargebacks) or on the marketplace, ODR provider or payment intermediary that has control over the payment flows of a transaction. The Working Group may wish to consider how the ODR system it is devising can or ought to work alongside such systems, and the intended contents of an Appendix in this regard.

10. Moreover, there is a clear value to having an in-built enforcement mechanism in a dispute resolution process, not only to users of the system but also to ODR providers, in order that that provider's system of dispute resolution provides a "one-stop shop" for parties seeking to resolve a dispute. The Working Group may wish to consider issues that may arise should ODR providers seek to control financial flows as well as serve a dispute resolution function (for example, should an ODR provider also decide to provide an escrow or delayed payment function as part of its dispute resolution function).

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<sup>6</sup> The descriptions of private enforcement mechanisms in this note are partly based on the following books and articles: Kaufmann-Kohler and Schultz, "Online Dispute Resolution: Challenges for Contemporary Justice", 2004 Kluwer Law International; Schultz, "Online Dispute Resolution: an Overview and Selected Issues", United Nations Economic Commission for Europe, Forum on Online Dispute Resolution, 6-7 June 2002; Rule, "Online Dispute Resolution for Business", Jossey-Bass 2002; Rogers, "Knitting the Security Blanket for New Market Opportunities: Establishing a Global Online Dispute Resolution System for Cross-Border Online Transactions for the Sale of Goods", in Wahab, Katsh & Rainey (Eds.), "Online Dispute Resolution Theory and Practice," Eleven International Publishing, 2012; Del Duca, Rule and Loebl, "Facilitating Expansion of Cross-Border E-Commerce — Developing a Global Online Dispute Resolution System (Lessons Derived From Existing ODR Systems — Work of the United Nations Commission on International Trade Law)", Penn State Law Legal Studies Research Paper No. 25-2011; Katsh and Rifkin, "Online Dispute Resolution: Resolving Disputes in Cyberspace", Jossey-Bass 2001.

<sup>7</sup> A/CN.9/769, para. 57: As a general matter relating to the content of draft article 8(bis), the Secretariat was requested to provide a document at a future session setting out an overview of existing private enforcement mechanisms. That request received support.

*Use of ODR Rules as confidence-building or promotional measure*

11. The use of private enforcement mechanisms, including trustmarks, begs the question of the foreseeable means by which merchants might utilize the Rules as a promotional measure. The Working Group may wish to consider the limitations of such promotion.

12. In particular, a merchant's advertising its use of the "UNCITRAL ODR Rules" might be problematic in the absence of any oversight mechanism to ensure that the Rules — which are in any event contractual and thus modifiable — were in fact being used by that merchant in whole or in part. In particular, there is a general prohibition on the use of the United Nations logo or emblem for commercial or non-official purposes without the permission of the Secretary-General (General Assembly Resolution 92(I) of 7 December 1946),<sup>8</sup> based on a concern for the legal and reputational implications of the logo's potential misuse or unauthorized appropriation by commercial entities. Likewise, the UNCITRAL logo cannot be used outside of compliance with that body's intended mandate.

13. A merchant could, however, advertise its resolution of disputes via a certain ODR provider on its website, and that ODR provider could be accredited or trustmarked (potentially by a State or non-governmental body) by reference *inter alia* to its use of the UNCITRAL ODR Rules. The Working Group may wish to consider, in that respect:

(i) Whether providers would be sufficiently well-recognized by purchasers to create a valued incentive to enter into a transaction, and/or whether the granting of accreditation (by a well-recognized entity such as a State or consumer protection agency) to providers could sufficiently create that recognition in transactions across national borders;

(ii) The consequential implication that the guardian of the ODR Rules would thus not necessarily be the merchant and purchaser, but rather, the ODR provider. The autonomy of the parties to a transaction to modify the contractual Rules as between themselves might thus be subject to the willingness of the ODR provider to so modify them (see also para. 6 of document A/CN.9/WG.III/WP.123).

## II. Brief overview of private enforcement mechanisms creating incentives to perform

### A. General

14. Private enforcement mechanisms that exist with an aim to incentivise compliance with decisions or with certain standards include ratings systems, and trustmarks. These mechanisms are discussed further below. Like various other private enforcement mechanisms, there is also an element of commonality between these two mechanisms: both ratings and trustmarks are indicators of trust, the difference being that the former is user-generated and the latter, institutionally-generated.

15. Commentators have suggested that the utility of both ratings and trustmarks might be compromised by fraudulent actors, which can mask their identities and provide false ratings or create fake trustmarks. The Working Group may wish to consider the potential for such fraud and the implications for the use of ratings and trustmarks in the context of the ODR Rules, and whether such a risk can be mitigated.

16. The Working Group may also wish to consider more holistic alternatives to a trustmark or ratings-only mechanism. Possible alternatives are set out in subparagraph D below.

### B. Ratings

17. One way in which to build trust as part of the overall transaction, of which dispute resolution is one component, is to invite purchasers to provide ratings. This is currently

<sup>8</sup> A/RES/92(I). See also Interoffice Memorandum to the Senior Legal Advisor, Office of the Secretary-General, World Meteorological Organization, on guidelines on the use of the United Nations emblem, *United Nations Juridical Yearbook 2004* at 366-368.



common practice in certain online marketplaces in relation to the transaction as a whole, and relies on voluntary feedback from individual purchasers.

18. The Working Group might consider whether ratings could also be utilized specifically in relation to a dispute resolution mechanism: for example, whether purchasers could be invited to provide ratings in relation to the compliance of a merchant with the terms of a settlement agreement, a recommendation by a neutral, or an arbitral award.

19. In this respect, the Working Group may wish to consider the following questions:

- (i) On what basis would ratings be given, and by whom (by parties to a transaction? By an ODR provider?) Would ratings systems be sufficiently consistent in relation to different merchants to be useful?
- (ii) Where would those ratings be made public? For example, would they be published on the website of the merchant, or only on that of the ODR provider?
  - a. If the latter, would they be brought sufficiently to the notice of the public to be useful?
  - b. If the former, what would prevent a merchant from publishing false or fraudulent ratings (about itself or its competitors)? Would a merchant be inclined to indicate on its website that it had a good record of compliance with dispute resolution outcomes, if the implication was that transactions with that merchant tended to give rise to disputes ?
- (iii) Would factors such as the subjective nature of ratings, low response rates, or “incorrect” negative ratings reflecting disagreement with the outcome rather than compliance with the outcome, be factors that would have a substantial impact on whether ratings would serve as an effective private enforcement mechanism?

### C. Trustmarks

20. “Trustmarks” in the context of business-to-consumer (B2C) ODR can be described as quality labels that typically take the form of seals or logos sold or otherwise granted (i) by ADR and ODR providers to online merchants, in order that merchants can put such seals on their sites to let buyers know that they are certified by a third party as a trustworthy transaction partner; or (ii) by independent third parties to ODR providers by way of accreditation.

21. The Working Group may wish to consider the likelihood or viability of a government or respected non-profit issuing trustmarks to ODR providers on the basis of their use of the UNCITRAL ODR Rules and/or adherence to guidelines for those providers (envisaged under the draft preamble to the Rules).

#### (i) *Trustmarks sold or otherwise granted to online merchants*

22. Where a merchant is certified by an ODR provider, the trustmark can inform the customer that the trader has committed to complying with certain standards or best practices, including utilizing dispute resolution mechanisms. A trustmark may incentivise online merchants to comply with the decisions or recommendations reached in ODR proceedings, where non-compliance is a ground for removal of the trustmark.

23. The ODR provider granting trustmarks may generate revenue pursuant to this practice, as trustmark holders typically pay the grantor for the right to display the trustmark. Alternatively, or in addition, an ODR provider might only agree to serve in a provider function for those merchants that adhere to its trustmark standards.

24. In the context of the UNCITRAL ODR Rules, the Working Group may wish to consider:

- (i) Which third party entity would sell or otherwise grant trustmarks, and by consequence have a quality-control function in relation to merchants?
- (ii) Does, or might, a conflict of interest issue arise insofar as a transactional component exists in the granting of trustmarks to merchants? For example, might it

result in forum shopping by merchants to select ODR providers perceived to be favourable to them, or might it result in lack of neutrality of ODR providers who wish to be selected by merchants?

(iii) On which basis such trustmarks would be sold or provided? In other words, what criteria would be used? Would criteria be uniform across trustmark providers or could different providers use different criteria? Would a trustmark be issued to an online merchant simply because that merchant used the ODR Rules? Because it abided by decisions rendered by a neutral? Would a trustmark be issued to an ODR provider because it complied with a document, to be drafted, setting out Rules and Guidelines for ODR providers?

(iv) In the absence of a global system of accreditation, how would the third party accreditor itself be regulated, if at all?

(v) How a global system of trustmarks might work alongside existing regional systems of trustmarks.

(ii) *Trustmarks sold or otherwise granted to ODR providers*

25. The primary issue for consideration in relation to trustmarks may in fact relate to their recognition value; in order to be effective, a trustmark must be recognized and valued, thus implying that the third party granting that trustmark must have a recognizable reputation. One option in that respect may be for an ODR provider to develop a reputation as a trusted and valued provider of dispute resolution services, or to, by association with (e.g.) a governmental or standards-giving body, have an inherent recognition value.

26. In that respect, where an ODR provider has, or has developed, a positive recognition value, whether by virtue of its own commercial brand or because of State or other support it receives, a merchant may wish to use the imprimatur of that provider to advertise its use of a viable online dispute resolution procedure.

## D. Possible alternative mechanisms

27. In terms of creating incentives for merchants to comply with ODR decisions and/or quality standards, the Working Group may wish to consider whether alternative solutions may exist. The following examples represent a more radical and holistic approach to an online dispute resolution process, including an enforcement stage, than that previously considered by the Working Group. However experts have observed that such an approach may provide more robust incentives to merchants to comply with dispute resolution outcomes than ratings or trustmarks alone. Specifically, the Working Group may wish to consider:

(i) Enforcement mechanisms whereby a non-compliant merchant could be subject to suspension of its domain name;

(ii) How or whether a “merchant black list” might be established and maintained, in order for browsers to be able to mark a merchant as risky (by, for example, turning the URL red);

(iii) Whether it would be possible to work with marketplaces (like eBay and Amazon) or payment providers (like PayPal, or Mastercard/Visa) to suspend accounts of non-compliant merchants;

(iv) Whether a system of fines or potential of loss of membership could be set up through business associations and chambers of commerce in order to penalize merchants for non-compliance.

28. All of these “alternative” mechanisms could work in tandem with ratings or trustmark systems and/or other enforcement mechanisms.

29. However, all of these alternative mechanisms involve a third party to create the requisite incentive for compliance. The Working Group may wish to consider how and whether such third party involvement could be effected.

### **III. Brief overview of private enforcement mechanisms providing for an “automatic” execution of the case outcome**

#### **A. General**

30. Private enforcement mechanisms that aim to provide for an automatic or self-executing outcome have several limitations when considered in the context of procedural rules agreed as between parties to a transaction.

31. Specifically, these mechanisms, and in particular chargebacks, tend to be perceived as parallel dispute resolution processes in themselves, within a system managed by a payment intermediary (such as a credit card company or bank) which has actual or de facto control over both the adjudicative process and the financial flows arising out of the transaction, or as mechanisms which in other ways rely on control of the financial resources in dispute. Indeed where such mechanisms exist in practice, they are perceived to serve a useful purpose but one that does not necessarily provide a panacea for the dispute resolution “gap” the Working Group has been mandated to address.

32. Indeed were the use of such mechanisms to be considered as part of a dispute resolution system such as the one the Working Group has been mandated to undertake, the Working Group would need to consider how such mechanisms in fact would or could be integrated into the ODR Rules in their present form, and/or work in the broader online dispute resolution framework it is devising.

33. Separately, and in addition, it is important to note that self-execution mechanisms do not amount to a “final and binding” outcome, insofar as a purchaser would still retain recourse to a court process, however unlikely he or she may be to pursue it.

34. Given the commonalities of the mechanisms by which enforcement of a decision or settlement agreement could be effected when a third party has control of the resources in dispute, this note considers chargebacks only, by way of example.

#### **B. Chargebacks**

35. Self-execution can in some instances be implemented via a “chargeback”, a process whereby a purchaser disputes a charge and consequently requests reimbursement from a payment intermediary (such as a credit card company), with that intermediary (where it has already passed on the purchased funds to the merchant) in turn attempting reimbursement from the merchant. Under some national legislation, the purchaser must have been defrauded by the merchant in order to obtain a chargeback. In other jurisdictions, either under national law or where no legislation exists in relation to chargebacks, a cardholder may be able to dispute and cancel payment or to be credited the payment amount in instances including non-performance or defective performance by the merchant.

36. In either context (fraud or non-performance), the payment intermediary, essentially (or actually, as is the case with some card issuers, which have an arbitration committee for the purpose) serves an adjudicative role by requesting information from the purchaser regarding the reason for disputing the charge and determining whether to grant that charge. In effect, such a process binds the merchant to the dispute resolution process without binding the purchaser. Some payment intermediaries, such as Visa and Mastercard, have detailed processes for undertaking such an adjudicative function, although commentators note that much more frequent is the passing of the disputed amount back and forth between the disputing parties until one party decides no longer to pursue the reimbursement. Commentators have also noted that the credit card issuer or bank may have conflicts of interest with one or more parties to a transaction.

37. The chargeback process is governed in some countries by national legislation, a fact which may not in itself be a bar to creating a global system of chargebacks (as legislation typically tends to encourage chargebacks and provide a framework for pursuing a chargeback), but which the Working Group may wish to consider in determining how a cross-border chargeback system might be made to function.

38. Moreover, the protection offered by chargebacks is also limited to purchasers making purchases using credit cards; other forms of payment (debit cards, online banking-based Internet payments, mobile phone payments etc.) are not subject to redress via such a mechanism. This has the concurrent disadvantage, also set out above, of only permitting financial recourse within the enforcement of a dispute resolution outcome.

39. In brief, the chargeback process as it traditionally works, that is, undertaken within the framework of the credit card networks or other payment intermediaries, consists of adjudicative processes specific to those intermediaries. The payment intermediary determines whether a purchaser has a right to a chargeback. The Working Group would need to consider whether and how the roles and liabilities of a third party such as a payment intermediary could be integrated into the procedural framework it is devising.

### C. Escrow accounts

40. Another system of enforcement that is prevalent in certain regions, and may provide broader scope of application than chargebacks (because it applies more broadly than just to credit card transactions) is that of escrow accounts. Under an escrow system, payment is made by the purchaser into a third party account, and after a certain time period, barring any complaints or conversely upon verification that the goods have been received as expected, money is disbursed to the merchant. The merchant also receives comfort in an escrow system that the transaction funds will be paid.

41. In the event there is a complaint, the escrow agent withholds payment until the dispute is resolved via an online dispute resolution process. The escrow agent may be a third party (referred to in an additional clause in the contract), or the ODR provider itself. An escrow agent typically is subject to national legislation and licensing rules.

42. On the one hand, a legitimate escrow service may protect a purchaser from suffering financial implications should it engage in a transaction with a fraudulent merchant. There is, as with other mechanisms set out in this note, also a certain potential for fraud in online escrow systems themselves, insofar as rogue merchants may set up false accounts that resemble legitimate escrow services. Various online auction sites and consumer bodies have set up guidelines to help consumers identify potentially fraudulent escrow services.

## IV. Conclusion

43. In relation to mechanisms intended to create incentives for merchants to comply with decisions or settlement agreements, the Working Group may wish to consider more radical and/or holistic approaches in respect of the financial or other incentives that might be required to prevent non-compliance.

44. In relation to mechanisms intended to provide for an automatic enforcement functions, chargebacks, while a useful model, may be limited in their utility given that they apply only to payments made by credit card, and moreover are generally perceived as a parallel process within the context of credit card purchases, rather than necessarily a mechanism that could be appended to the end of a discrete resolution process. The Working Group may wish to consider whether the ODR framework the subject of its work could or ought to be modified to accommodate or work alongside such mechanisms.

45. In relation to all possible mechanisms set out above, the Working Group may wish to consider how the framework for online dispute resolution might best engage with internet intermediaries, payment companies and banks — in other words, entities with the market power to create incentives for merchants — in order to formulate a system of incentivisation or enforcement that could work alongside the ODR Rules it is devising.

**D. Note by the Secretariat on online dispute resolution for cross-border  
electronic commerce transactions: draft procedural rules — Proposal by the  
Governments of Colombia, Honduras, Kenya and the United States**

(A/CN.9/WG.III/WP.125)

[Original: English]

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## I. Introduction

1. Following the forty-sixth session of the United Nations Commission on International Trade Law, the Governments of Colombia, Honduras, Kenya and the United States submitted to the Secretariat the following text, which is reproduced below in the form in which it was received by the Secretariat.

## II. Proposal by the Governments of Colombia, Honduras, Kenya and the United States of America

The following paper was prepared by the delegations of Columbia, Kenya, Honduras and the United States for the forty-sixth session of the UNCITRAL Commission. Because the Commission did not address substantive subject matter issues, it was agreed that the substance of the proposal would be addressed at the next session of the Working Group.

Online Dispute Resolution

Submission by the Delegations of Colombia, Honduras, Kenya and the United States

### I. Summary

In 2010, the Commission created a new ODR Working Group with a mandate “to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions, including business-to-business and business-to-consumer transactions.”<sup>1</sup> It was pointed out “that the goal of any work undertaken by UNCITRAL in that field should be to design generic rules, which, consistent with the approach adopted in UNCITRAL instruments (such as the Model Law on Electronic Commerce), could apply in both business-to-business and business-to-consumer environments.”<sup>2</sup>

At the 2012 Commission Session, both developing and developed countries expressed the view that the rules needed to provide for final and binding arbitration awards. The Commission specifically directed Working Group III to consider and report back “on how the rules respond to the needs of developing countries and those facing post-conflict situations, in particular with regard to the need for an arbitration phase to be part of the process.”<sup>3</sup> Working Group III met twice during the period between Commission sessions, but it did not consider and report back on these issues.

Instead, the Working Group decided to continue discussions on the basis of a proposal from one regional group that would provide for the extraterritorial application of their domestic laws in a way that restricts the freedom of merchants to enter into online arbitration

<sup>1</sup> Report of the Forty-third Session of the United Nations Commission on International Trade Law (June 21-July 9, 2010), UN Doc. A/65/17, para. 257.

<sup>2</sup> *Id.* at para. 253.

<sup>3</sup> Report of the Forty-fifth Session of the United Nations Commission on International Trade Law (25 June 21-6 July 2012), UN Doc. A/67/17, para. 79(a).

agreements in cross-border e-commerce transactions.<sup>4</sup> The proposal raises serious questions about how online merchants would be able to comply with the Rules, and in what court the parties would be expected to resolve their disputes.

The revisions to the Rules proposed at the last session of the Working Group will not create an enabling legal environment for micro and small businesses to reach international markets through electronic commerce, given the tension between different conceptions about judicial jurisdiction and the practical impossibility of resolving high-volume, low-value cross-border disputes in court. The Rules should not simply reflect the views of countries from a particular region where judicial remedies may be available for parties from that region but not to parties from outside that region.

We request that the Commission again direct that the Working Group report back on the need for the Rules to include final and binding arbitration, particularly for parties in under-developed and developing countries and countries in post-conflict situations where basic legal frameworks are absent or ineffectual. We also request that the Commission direct that the following considerations be addressed:

1. The Rules should enable micro and small businesses to effectively reach international markets through electronic and mobile commerce;
2. The Rules should recognize that traditional judicial mechanisms are not an option for resolving cross-border e-commerce disputes;
3. The Rules should provide a clear and simple process that includes online arbitration of disputes so that sellers cannot avoid their responsibilities to dissatisfied buyers;
4. Online awards can and should be recognizable and enforceable under the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), but reliance on that mechanism alone is not sufficient;
5. The Rules should not give extraterritorial effect to domestic laws of some countries that require court resolution of disputes and thus prohibit the effective operation of the ODR system for parties in other countries.

We also request that the fall 2013 meeting on Online Dispute Resolution (ODR) be scheduled to follow the meeting on arbitration in order to facilitate assigning a portion of the ODR meeting to the question of consistency of the proposed Rules for ODR with international arbitration law and practice.<sup>5</sup> States might be invited to include their arbitration experts as delegation members, along with their ODR experts to facilitate the discussion.<sup>6</sup>

## **II. The Rules Should Enable Micro and Small Businesses to Effectively Reach International Markets through Electronic and Mobile Commerce**

We have separately stressed the crucial importance of establishing an enabling legal environment for micro and small businesses to effectively reach international markets through electronic and mobile commerce.<sup>7</sup> As numerous studies have shown, future

<sup>4</sup> Proposal by the European Union observer delegation, UN Doc. A/CN.9/WG.III/WP.121 (May, 2013). The Chairman determined that “all components of the proposal would be put in square brackets for further consideration and that the concerns raised in relation to the proposal would need to be further addressed.” Report of Working Group III (Online Dispute Resolution), (New York, 20-24 May 2013), UN Doc. A/CN.9/769, para. 43. The regional group proposal is discussed in more detail in Section VI.

<sup>5</sup> The arbitration session is tentatively scheduled for 16-20 September in Vienna. This would mean changing the tentative dates for the ODR session from 18-22 November to 23-27 September. A working group session is tentatively set for 23-27 September in Vienna, but no specific project has been assigned.

<sup>6</sup> At the second Working Group Session, “[i]t was noted that any discussion of the involvement of the New York Convention must take account of the advice and deliberations of Working Group II (Arbitration and Conciliation).” Report of Working Group III (Online Dispute Resolution), (New York, 23-27 May 2011), UN Doc. A/CN.9/721, para. 18. Sessions addressing the overlap of two areas of legal expertise have been held from time to time in UNCITRAL. For example, in 2008 the Commission authorized the Secretariat to organize a joint discussion of the impact of insolvency on a security right in intellectual property when Working Groups V (Insolvency) and VI (Security Interests) met back to back. Report of the Forty-first Session of the United Nations Commission on International Trade Law (16 June-3 July 2008), UN Doc. A/63/17, para. 326.

<sup>7</sup> Proposal by the Government of Colombia, UN Doc. A/CN.9/790, 7-8 (2013); Proposal by the

economic growth and commercial development is inextricably linked to the Internet and electronic commerce. UNCITRAL has found that “[o]ne of the main drivers underlying e-commerce growth is the number of individuals connected to the Internet.”<sup>8</sup> As the 2013 Microfinance Colloquium report concludes, “Internet usage has exploded over the last 10 years”:

in Africa Internet usage increased by nearly 3000 per cent over the last 10 years, in the Middle East by nearly 2250 per cent, in Latin America, by over 1200 per cent (for instance Brazil ranks fifth, Mexico twelfth and Colombia eighteenth in the world in number of individuals connected to the Internet), and in Asia by nearly 800 per cent. Globally, Internet usage has increased by 528 per cent over the last decade: approximately one third of the world’s population is now connected to the Internet. That number is expected to increase to forty-seven per cent by 2016.<sup>9</sup>

Micro and small businesses are the key drivers of economic growth and job creation in both developing and developed economies. Micro and small businesses stand to be among the chief beneficiaries in any digital economy expansion since the Internet has the potential to facilitate faster entry and participation for these businesses in the global economy.

Consumers stand to benefit enormously from the development of international e-commerce through access to competitive products and prices through the online marketplace. Our governments, like those of every country, also want to ensure that consumers are properly protected in their cross-border electronic transactions. As the Working Group has concluded: “consumer protection is not merely a local but a regional and international issue, in which ODR can play a positive role by promoting interaction and economic growth within regions, including among post-conflict countries and in developing countries.”<sup>10</sup>

The challenges for Internet commerce, however, are still great. For micro and small businesses to effectively reach global electronic commerce markets, it will be necessary to develop an enabling legal environment that fosters trust in cross-border electronic commerce transactions and provides a seamless system for trade. A key component in establishing consumer and vendor confidence, and therefore enhancing the use of cross-border e-commerce, is access to justice. The ODR project has been based on the assumption that mere access to courts in such transactions does not effectively provide access to justice, and that the system must make available an effective, low-cost means of redress of disputes, particularly when the transactions are conducted online with another party located in a different country.

The failure of UNCITRAL to address these concerns would limit the future growth of cross-border e-commerce, and have a particularly negative effect on consumer choice and emerging entrepreneurial ventures.<sup>11</sup>

### **III. Traditional Judicial Mechanism Are Not an Option for Resolution of Cross-Border E-Commerce Disputes**

In creating an ODR working group in 2010, the Commission endorsed the view that “traditional judicial mechanisms for legal recourse did not offer an adequate solution for cross-border e-commerce disputes, and that the solution — providing a quick resolution and enforcement of disputes across borders — might reside in a global online dispute resolution

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Government of the United States regarding UNCITRAL future work, UN Doc. A/CN.9/789, 7 (2013).

<sup>8</sup> Note by Secretariat, Possible future work on online dispute resolution in cross-border electronic commerce transactions, UN Doc. A/CN.9/706, para. 9 (2010).

<sup>9</sup> Note by the Secretariat, Microfinance: creating an enabling legal environment for micro-business and small and medium-sized enterprises, UN Doc. A/CN.9/780, para. 52 (2013).

<sup>10</sup> Report of Working Group III (Online Dispute Resolution, (New York 21-25 May 2012), UN Doc. A/CN.9/744, para. 132(c).

<sup>11</sup> According to EU market studies substantial cost savings and increased access to products are theoretically available to EU consumers through cross-border e-commerce. Yet, the EU has found that most cross border e-commerce orders fail (61 per cent) because the trader refused to serve the consumer’s country or did not offer cross-border payment. See European Commission Market Studies, available at [http://ec.europa.eu/consumers/consumer\\_research/market\\_studies/e\\_commerce\\_study\\_en.htm](http://ec.europa.eu/consumers/consumer_research/market_studies/e_commerce_study_en.htm).

system for small-value, high-volume business-to-business and business-to-consumer disputes.”<sup>12</sup>

The pro-arbitration policy in instruments such as the UNCITRAL 2010 Arbitration Rules, the UNCITRAL Model Law on International Commercial Arbitration, and the New York Convention is based on the fact that international arbitration provides greater, not lesser, access for parties engaged in international transactions to a dispute settlement mechanism. Domestic notions of guarantees of access to judicial relief must be seen in the context of competing jurisdictional claims by different national courts, as well as different jurisdictional, choice-of-law, and enforcement difficulties that arise in cross-border disputes.<sup>13</sup>

These barriers to seeking and obtaining a judicial remedy are magnified in high-volume, low-value cross-border consumer transactions where a foreign supplier is involved. As the Working Group has recognized, “there exists no international treaty providing for cross-border enforcement of court awards, underlining the importance of binding decisions under ODR.”<sup>14</sup> In the 2005 Hague Convention on Choice of Court Agreements, not yet in force, States did ultimately reach agreement on cross-border enforcement of judicial judgments in B2B transactions (involving choice of court agreements), but B2C transactions were carved out because of concerns about which court (i.e. the vendor or the consumer) should have competent jurisdiction over the parties in e-commerce transactions. The Permanent Bureau of the Hague Conference identified that disputes over online transactions differ in some ways from other disputes:

[B]usiness interests and other Internet users ... are concerned that they will be forced to defend themselves against actions in a multitude of jurisdictions with no ability to narrow the scope of such expansive jurisdictional claims since a website is globally transmitted and it is virtually impossible to determine where a customer is located with certainty. Closely connected is that each jurisdiction will apply its own choice of law rules, ... thereby subjecting e-commerce businesses and Internet users to a considerable number of potentially conflicting legal frameworks ... [I]t is particularly burdensome for users to remain apprised of all of these new [legal] developments in numerous jurisdictions ... Many countries are still deciding which approach is preferable [i.e. court of vendor or buyer] and some of their deliberations are contingent upon the growth of, for example, online dispute resolution techniques, which may provide a valid alternative by which a consumer can obtain an effective remedy. In addition, the Internet may require lawmakers to re-evaluate the traditional legal doctrines as applied to consumers and businesses, which are based on an assumed bargaining power differential. Because Internet businesses may be quite small and Internet consumers have instant access to enormous amounts of information, highly sophisticated analytical tools and substantial choice online, the relative strength of the two parties is not always obvious. The ability of consumers to make enforceable choices of law and fora might be reconsidered.<sup>15</sup>

As the Working Group has also acknowledged, it is unlikely that a foreign e-commerce supplier will be amenable to suit in the jurisdiction of the consumer, will have assets in that jurisdiction that can be used to provide the consumer an effective remedy, or will come from a state that would recognize and enforce a judicial judgment issuing from the consumer’s home jurisdiction (and, even if so, at a cost that is not prohibitive to the consumer in high-volume low-value cases).<sup>16</sup> Moreover, if the foreign supplier agreed (or was required) to

<sup>12</sup> Report of the Forty-third Session of Commission, *supra* note 1 at para. 254.

<sup>13</sup> See Born, *International Commercial Arbitration*, 577-579 (2009).

<sup>14</sup> Report of May 2012 WG, *supra* note 10 at para. 119.

<sup>15</sup> Permanent Bureau of the Hague Conference, *The Impact of the Internet on the Judgment Project: Thoughts for the Future*, Preliminary Document No. 17 of February 2002 at 8-11, *available at* [http://www.hcch.net/upload/wop/gen\\_pd17e.pdf](http://www.hcch.net/upload/wop/gen_pd17e.pdf) (footnotes omitted).

<sup>16</sup> See e.g., Report of Working Group III (Online Dispute Resolution, (Vienna, 13-17 December 2010), UN Doc. A/CN.9/716, para. 16. In many jurisdictions, including Colombia, Kenya, Honduras, and the United States, choice of forum clauses in B2C transactions are generally enforceable provided they are adequately disclosed and are not unjust and unreasonable. See United States Response to Proposals for a Convention and Model Law on Jurisdiction and Applicable Law at 3 (2011), *available at* [http://www.oas.org/dil/CIDIP-VII\\_consumer\\_protection\\_brazil\\_joint\\_proposal\\_Comments\\_United\\_States.pdf](http://www.oas.org/dil/CIDIP-VII_consumer_protection_brazil_joint_proposal_Comments_United_States.pdf). In other



litigate disputes in the courts of the buyer, it would create a substantial competitive advantage for domestic or regional producers who would be able to litigate disputes in their domestic courts (or in some jurisdictions through regional small claims tribunals) at a much lower cost. In all events, as pointed out in the 2012 Commission session, 4 billion persons lack access to judicial remedies, let alone in cross-border e-commerce transactions for which the ODR Rules are intended.<sup>17</sup>

#### IV. The Rules Should Provide a Clear and Simple Process that Includes Online Arbitration of Disputes

Global trade relies on existing UNCITRAL instruments such as the UNCITRAL arbitration rules, the UNCITRAL Model Law on Commercial Arbitration, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), to enable transactions both large and relatively small, including B2B and B2C. What has been envisioned from the outset is that UNCITRAL should develop a set of simple generic rules that are similar to these existing UNCITRAL instruments, but adapted to the ODR context for low-value, high volume e-commerce disputes.<sup>18</sup> At the very first session “[i]t was agreed that arbitration was a necessary component of ODR (since without it there could be no final resolution of those cases which were not settled in earlier stages) but several delegations urged that in any ODR most disputes would need to settle prior to the arbitration phase so that arbitration would occur in only a small percentage of cases that could not be resolved otherwise.”<sup>19</sup>

At the November 2012 Session of the Working Group the prevailing view was again that the Rules should provide for final and binding awards, consistent with the UNCITRAL 2010 Arbitration Rules and the New York Convention.<sup>20</sup> Nonetheless, one regional group continues to argue “the easiest way forward for designing a global standard for ODR could be to envisage ... an ODR process not modelled on arbitration.”<sup>21</sup> To the contrary, as was explained at the 2012 session of the Commission:

a global system for online dispute resolution must provide for final and binding decisions by way of arbitration and that such a system could be of great benefit in developing countries and countries in post-conflict situations for the following reasons:

- (a) It would improve access to justice by providing an efficient, low-cost and reliable method of dispute resolution where, in many cases, trusted and functioning judicial mechanisms did not exist to deal with disputes arising from cross-border electronic commerce transactions;
- (b) That in turn would contribute to economic growth and the expansion of cross-border commerce, instilling confidence in parties to such transactions that their disputes could be handled in a fair and timely manner;
- (c) It would enable greater access to foreign markets for small and medium-sized enterprises in developing countries and, in the event of a dispute, mitigate their

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jurisdictions there may be an absolute rule against choice of forum clauses in consumer e-commerce transactions. See Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I), available at [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/133054\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/133054_en.htm). Consumers engaging in transactions with vendors within the European Union might be able to enforce judgments cross-border under Brussels I.

<sup>17</sup> Note by the Secretariat, Selected legal issues impacting microfinance, UN Doc. A/CN.9/756, para. 24 (2012). At the Working Group sessions, “emphasis was also placed on the importance of ensuring that the procedural rules were relevant to the situation in developing countries, where small and medium enterprises lacking financial literacy might be claimants, and where in the absence of effective judicial remedies, ODR might be the only option available to such claimants. Report of May 2011 WG, *supra* note 6, para. 93.

<sup>18</sup> Report of December 2010 WG, *supra* note 16, para. 17.

<sup>19</sup> *Id.* at para. 30. Additionally, “[i]t was agreed that decisions should be final and binding, with no appeals on the substance of the dispute, and carried out within a short time period after being rendered.” *Id.* at para. 99.

<sup>20</sup> Report of Working Group III (Online Dispute Resolution), (Vienna, 5-9 November 2012), UN Doc. A/CN.9/762, paras. 26-30, 34-35.

<sup>21</sup> Proposal by the European Union observer delegation, *supra* note 4, at 7.

disadvantage when dealing with more commercially sophisticated parties in other countries that had access to greater legal and judicial resources.<sup>22</sup>

In short, given that adequate court remedies are not available cross border, an ODR platform, with binding arbitration as a “backstop,” serves as a strong incentive to move the parties to voluntary resolution. Under UNCITRAL ODR, most cases will be resolved amicably through negotiation or facilitated settlement. If not resolved amicably, the parties need the option of arbitration. Binding arbitration will protect consumers by ensuring that their claims against vendors are properly respected. At the same time, binding arbitration will also protect developing country vendors by preventing fraud by sophisticated Internet scam artists who, as purchasers, are ostensibly “consumers.”<sup>23</sup>

#### V. Online Awards Should Be Recognizable and Enforceable Under the New York Convention But Reliance on That Mechanism Alone Is Not Sufficient

At the outset of the negotiations, “there was a general consensus that it could be assumed the New York Convention would be applicable to enforcement of arbitral awards under ODR cases in B2B and B2C cross-border disputes, but that reliance on that mechanism alone was insufficient ...”<sup>24</sup> The regional group now asserts “[i]t is doubtful if arbitral awards rendered under such a process would be capable of being enforced under the 1958 New York Convention.”<sup>25</sup>

To the contrary, the process does provide for the requisites for recognition and enforcement by way of the New York Convention. In this regard, UNCITRAL in 2006 adopted a recommendation on the interpretation of the requisites for enforcement under the New York Convention in recognition of the widening use of electronic commerce.<sup>26</sup> Specifically, UNCITRAL recommended that Article II, paragraph 2, of the New York Convention, which defines “agreement in writing,” be applied flexibly, “recognizing that the circumstances described therein are not exhaustive” in light of arbitration agreements that are concluded entirely online. In addition, UNCITRAL recommended that States adopt article 7 of the UNCITRAL Model Law on International Commercial Arbitration as revised, which specifically recognizes that the writing requirement of an arbitration agreement may be met by an electronic communication including, but not limited to, electronic data interchange, electronic mail, telegram, telex, or teletype.<sup>27</sup> The ODR Working Group has requested that definitions of “writing”, “signature”, and “electronic signature” be added to the draft Rules, based on existing UNCITRAL standards as set forth in the Model Law on Electronic Commerce.<sup>28</sup> The requirement that an award be in writing and signed by the neutral is based on article 31(1) of the UNCITRAL Model Law on International Commercial Arbitration.<sup>29</sup>

<sup>22</sup> Report of the Forty-fifth Session, *supra* note 3, para. 76.

<sup>23</sup> If mediation only were offered, respondents (including vendors or consumers, depending on the case) would have an incentive to make a low-value, “take it or leave it” offer to claimants, knowing that the injured party would have no meaningful alternative but to accept the offer, since court remedies are not available. Arbitration would provide an alternative that would prevent this lopsided bargaining situation.

<sup>24</sup> Report of December 2010 WG, *supra* note 16 at para. 98.

<sup>25</sup> Proposal by the European Union observer delegation, *supra* note 4 at 3.

<sup>26</sup> 2006 — Recommendation regarding the interpretation of article II (2) and article VII (1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), available at [http://www.uncitral.org/uncitral/uncitral\\_texts/arbitration/2006recommendation.html](http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2006recommendation.html).

<sup>27</sup> *Id.* Additionally, of relevance is the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts (entered into force January 3, 2013, three States Parties). The Convention includes in article 20 a provision intended to clarify that electronic communications may also be used in connection with the formation or performance of contracts that are subject to certain Conventions, including the New York Convention. While the overall application of the Electronic Communication Convention does not expressly apply to B2C transactions, the intent of States with regard to Article 20 is clearly to underscore the functional equivalence of electronic communications for international agreements and online awards under the New York Convention, including in a B2B and B2C context. Focusing on B2B in the Convention was not done to create or imply different standards for B2C but to narrow the scope of the treaty for other reasons. *See id.* at para. 72.

<sup>28</sup> Report of May 2012 WG, *supra* note 10 at para. 59; Report of November 2012 WG, *supra* note 20 at para. 44. *See also* A/CN.9/WG.III/WP.119/Add.1 at paras. 60-61.

<sup>29</sup> A/CN.9/WG.III/WP.119/Add.1 at para. 59.

Once these requirements are satisfied, we believe that ODR awards can and should be enforceable under the New York Convention. Of course, as the Secretariat has pointed out, the application of the Convention (as well as the UNCITRAL Model Law on Electronic Commerce and the UNCITRAL Model Law on International Commercial Arbitration) to any specific e-commerce dispute will depend on the law of the seat of arbitration. Yet it would be anomalous and would indirectly undermine the New York Convention if UNCITRAL were to develop an arbitral regime that produced arbitral awards that would not be so enforceable. It would also undermine the principal purpose of the ODR system to be created by UNCITRAL — to create an effective and efficient set of procedural rules for the settlement of disputes in all high-volume, low-value online transactions.

The regional group further maintains that, even assuming that awards would be capable of being enforced, “it is unrealistic to believe that arbitral awards rendered in the context of low-value, high-volume transactions could be enforced across borders under the 1958 New York Convention ... in cases where the judicial system at the place where the respondent resides or otherwise has his assets does not perform well.”<sup>30</sup> Obviously, the Working Group recognized this point when it concluded that the New York Convention would be applicable to enforcement of arbitral awards under ODR cases in B2B and B2C cross-border disputes, “but that reliance on that mechanism alone was insufficient ...”<sup>31</sup> The Working Group Report states that “[d]iscussion then centered on other options that might be used to enforce awards in a more practicable and expedited fashion”:

One option was to emphasize the use of trustmarks and reliance on merchants to comply with their obligations thereunder. Another was to require certification of merchants, who would undertake to comply with ODR decisions rendered against them. In that regard, it was said to be helpful to gather statistics to show the extent of compliance with awards. Finally, it was stressed that an effective and timely ODR process would contribute to compliance by the parties.<sup>32</sup>

While these private enforcement mechanisms should be quicker, easier, less expensive, and therefore much more used in practice, nevertheless, the enforceability of issued awards under the New York Convention may as a practical matter be a prerequisite for such private enforcement systems or methods. Domestic private enforcement mechanisms operate effectively because of the potential recourse to binding domestic arbitration or litigation in the absence of voluntary compliance. Significantly, in most international arbitration cases, parties voluntarily comply with arbitral awards because of the unlikelihood that they can evade enforcement under the New York Convention.<sup>33</sup>

## **VI. The Rules Should Not Give Extraterritorial Effect To the Domestic Laws of Countries Prohibiting Party Choice of Forum for Dispute Settlement**

### A. Proper Treatment of Mandatory Domestic Law under International Arbitration Rules

It has been agreed that the ODR Rules, like the UNCITRAL Arbitration Rules, “shall govern the arbitration except where any of these rules is in conflict with a provision of law applicable to the arbitration, from which the parties cannot derogate.”<sup>34</sup> As the Working Group report explains:

It was agreed that the Rules being drafted were of a contractual nature, applied by agreement of the parties. The Rules were thus binding on the parties to the extent that domestic law allowed, and could not override mandatory law at the domestic level ...

... [T]he intent of the Rules was not to effect a change in domestic laws on a global scale, but to provide a practical avenue — which in practice did not exist at present — for the quick, simple and inexpensive resolution of low-value cross-border disputes,

<sup>30</sup> Proposal by the European Union observer delegation, *supra* note 4 at 3-4. The EU observer also states that “in the context of cross-border low-value, high-volume transactions — it is very likely that the cost of enforcing an arbitral award is much higher than the sum awarded.” *Id.* at 4.

<sup>31</sup> Report of December 2010 WG, *supra* note 16 at para. 98.

<sup>32</sup> *Id.*

<sup>33</sup> See Born, International Commercial Arbitration, *supra* note 13 at 2327 (“empirical studies and anecdotal evidence indicates that the percentage of voluntary compliance with arbitral awards exceeds 90 per cent of international cases”).

<sup>34</sup> Article 1(3) of the UNCITRAL 2010 Arbitration Rules.

matters for which it was not generally practicable to bring an action in the courts. This in itself was said to be in general a benefit to consumers who, if the ODR system was fair and effective, would likely not use domestic courts for such cases.<sup>35</sup>

Domestic laws may be relevant at the award enforcement stage:

If a dispute resolution clause specifies that disputes arising under the transaction will be conducted under Track I of the Rules (ending in arbitration), all parties would be bound by the final award where the applicable domestic law so permitted. Consumers in jurisdictions where pre-dispute arbitration agreements are not considered binding on them would engage in the same ODR process but would not be bound by the award under their national legislation (failing a post-dispute agreement to arbitrate).<sup>36</sup>

In this regard, Article 36(1)(b) of the UNCITRAL Model Law on International Commercial Arbitration and Article V(2)(b) of the New York Convention both provide that the country in which recognition or enforcement is sought need not recognize or enforce an arbitral award if the award would be contrary to its own public policy.<sup>37</sup>

#### B. Regional Group Proposal For Extraterritorial Application of Domestic Laws

Nonetheless, at the last session of the Working Group, one regional group argued that “saying that the Rules are intended to be only contractual in nature ... and that they therefore are incapable of setting aside consumer protection legislation ... is not enough.”<sup>38</sup> Instead, they asserted that Rules should place an affirmative obligation on “merchants, at the time of the transaction [to] generate two different online dispute resolution clauses, depending on the jurisdiction and status (business or consumer) of the purchaser ... ensuring that consumers from certain jurisdictions would not be subject to an arbitration track of the Rules, but rather only to ... a non-arbitral stage of proceedings.”<sup>39</sup> Additionally, an Annex would be added to the Rules “comprising a list of jurisdictions, which would opt in to inclusion on that list in order to exclude the application of Track I [arbitration] of the Rules to consumers in those jurisdictions ...”<sup>40</sup> Further, a provision would be added to the Rules stating: “These Rules shall not apply where one party to the transaction is a consumer from a state listed in Annex X, unless the Rules are agreed after the dispute has arisen.”<sup>41</sup> These changes would, in fact, “effect a change in domestic laws on a global scale,”<sup>42</sup> and would do so by imposing the law of one set of states on the residents of all other states.<sup>43</sup>

<sup>35</sup> Report of May 2012 WG, *supra* note 10 at paras. 15-16.

<sup>36</sup> Note by the Secretariat, Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules, UN Doc. A/CN.9/WG.III/WP.119, para. 17 (March, 2013).

<sup>37</sup> The U.S. Court of Appeals for the Second Circuit concluded that the public policy exception should be construed narrowly, and recognition or enforcement should be refused only where it would “violate the forum state’s most basic notions of morality and justice.” *Parsons v. Whittemore Overseas Co., Inc., v. Societe Generale de L’Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974). *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 472 U.S. 614, 639 (1985); *See Born*, International Commercial Arbitration, *supra* note 13 at 2837-39 (2009) (providing brief history of the public policy provision of the New York Convention).

<sup>38</sup> Proposal by the European Union observer delegation, *supra* note 4, at 6.

<sup>39</sup> Report of May 2013 WG, *supra* note 4 at paras. 21, 31.

<sup>40</sup> *Id.* at para. 34. The proposal further provided that “States would notify the UNCITRAL secretariat, prior to adoption of the ODR Rules, if they intend to be listed in Annex I ...”. Proposal by the European Union observer delegation, *supra* note 4 at 8.

<sup>41</sup> Report of May 2013 WG, *supra* note 47 at para. 32.

<sup>42</sup> *See* note 35 *supra* and accompanying text.

<sup>43</sup> Delegations opposed the proposal on a range of grounds including that: (1) “such a proposal would require the Working Group to revisit one of the fundamental areas on which it has achieved consensus, namely the inadvisability of defining ‘consumer’ in an international text;” (2) “devising an Annex purporting to decide for States which rules would apply to that State’s consumers was not for the Working Group to decide, and nor was it for States to provide that kind of submission or to update it”; (3) UNCITRAL should not as a matter of policy and could not “legally adopt Rules that self-proclaim they are inapplicable to certain States or parties as such”; and (4) “the proposal would be inconsistent with the structure and proper interpretation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, therefore undermining existing international arbitration practice.” Report of May 2013 WG, *supra* note 3 at paras. 24, 29, 37. We do not discuss herein all the grounds for opposing the proposal.

C. The Regional Proposal Is Inconsistent With the Nature of Procedural Rules

Such an imposition of the national laws of one group of countries on all other countries in a multilateral instrument is contrary to the purposes of UNCITRAL. Proper harmonization of law is not achieved merely by extending the national laws of one group of states to apply to the citizens of other states. Neither is it appropriate to use an UNCITRAL instrument to achieve such a goal.

At a minimum, the Working Group's mandate requires that its Rules be consistent with the framework that governs international arbitration through other existing UNCITRAL instruments. In this regard, Article 1(1) of the UNCITRAL Arbitration Rules specifically recognizes that the Rules apply where the parties have agreed that disputes between them shall be settled in accordance with the Rules "subject to such modifications as the parties may agree." Article 1(3) of the Arbitration Rules further provides that "These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail."

Given the contractual nature of procedural rules and the fact that the parties may adopt them in whole or in part, it would be beyond the mandate of the Working Group to attempt to impose obligations on merchants to determine the type of purchaser and its jurisdiction(s). This was recognized at the last session of the Working Group:

Ideally a business vendor's webpage or even an internal link within a dispute resolution clause should set out the implications of its dispute resolution procedures including the implications for consumers in certain jurisdictions of, for example, the non-binding nature of a pre-dispute resolution clause. *However, as imposing obligations on businesses is not within the scope of the Rules*, the Working Group may wish to consider whether the guidelines for ODR providers should require that the implications of Track I or Track II of the Rules (as applicable) should be stated clearly and simply for both parties when a claim is filed.<sup>44</sup>

Nor would it be consistent with the mandate of the Working Group for the Rules to direct the UNCITRAL Secretariat to maintain a list of states that have indicated that they wish to be listed in an annex. It is also not clear on what basis States would inform the Secretariat of their intent to be added to the list, as States may have very different rules that defy clear inclusion in a single list. The Working Group has not been charged with drafting a treaty or model law that would bind private parties; instead it has been requested to draft a set of generic contractual rules that may be modified by the parties to a dispute.

Further, placing an obligation on businesses to determine the jurisdiction and status (consumer or business) of counterparties would be inconsistent with the goal of promoting cross-border e-commerce. As the Secretariat stated:

requiring vendors to determine whether their counterparty is a business or consumer, and the relevant jurisdiction and law applicable to that counterparty, and to tailor their dispute resolution clause accordingly, would possibly thwart a presumptive objective of the Rules, namely to remove investigatory burden and risk from merchants to encourage them to sell cross-border. The Working Group has previously identified the difficulties inherent in categorizing consumers and businesses in the context of online transactions ...<sup>45</sup>

Additionally, providing for the parties to agree to arbitration post-dispute raises both legal and practical problems:

[T]he validity of the initial dispute resolution clause might be compromised if such a clause were to be superseded by a second "acknowledgement" or agreement. In any event, such a second click by consumers post-dispute could not resolve any concern relating to consumer respondents. Nor would a post-dispute agreement to arbitrate by both parties appear to be practical in either B2B transactions, or in the vast majority of B2C transactions, where the respondent is likely to be a business, thus substantially

<sup>44</sup> UN Doc. A/CN.9/WG.III/WP.119, *supra* note 36 at para. 18 (emphasis added).

<sup>45</sup> *Id.* at para. 9.

reducing the ability of claimants to achieve relief under the Rules in instances where a business respondent declines to arbitrate post-dispute.<sup>46</sup>

D. The Regional Proposal Is Inconsistent with the New York Convention Framework.

The regional proposal would also cause confusion with the mandate of UNCITRAL as it may operate inconsistently with the provisions of the New York Convention regarding which jurisdiction's law applies to the substantive validity or non-arbitrability of arbitration agreements. Specifically, the proposal that the Rules "shall not apply where one party to the transaction is a consumer from a state listed in Annex X, unless the Rules are agreed after the dispute" may be inconsistent with the obligations of State Parties under Article II of the Convention.<sup>47</sup>

Article II(1) of the New York Convention sets forth a mandatory obligation that states "shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." Article II(3) goes on to provide a mandatory enforcement mechanism for agreements to arbitrate requiring specific performance of those agreements to arbitrate, subject to only generally-applicable contract law defenses: "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."<sup>48</sup>

The Working Group understands "that the vast majority of national consumer protection laws allowed consumers to enter into arbitration agreements before a dispute arose."<sup>49</sup> Even for consumers from minority states that disallow such pre-dispute agreements, the substantive validity of such arbitration agreements under Articles II(3) and V(1) of the Convention may remain unaffected. As the Secretariat has pointed out:

The requirements of substantive validity of arbitration agreements are governed by "the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made" (article V(1)(a)). One of the main questions for consideration is whether there was a consent to arbitration by the parties. That question is left to be dealt with by applicable domestic law, and online arbitration agreements may not necessarily raise specific issues. Regarding B2C agreements, *the question is whether those arbitration agreements or pre-dispute arbitration agreements are recognized as valid under the applicable national laws*. That question has received different responses depending on the particular jurisdiction, and there is no harmonized approach to the matter.<sup>50</sup>

<sup>46</sup> *Id.* at para. 12.

<sup>47</sup> It is unclear how the provision would operate in practice. The regional group stated that it was not seeking a determination during the dispute of the type of purchaser and of its jurisdiction. *See also id.* and accompanying text.

<sup>48</sup> *See* Born, International Commercial Arbitration, *supra* note 13, at 569 (the New York Convention is "best interpreted as authorizing only the application of generally-applicable contract law defenses"). The U.S. Courts of Appeals have interpreted this clause narrowly, stating that "the clause must be interpreted to encompass only standard contract defense situations — such as fraud, mistake, duress, and waiver — that can be applied neutrally on an international scale." *See, e.g.,* DiMercurio v. Sphere Drake, PLC, 202 F.3d 71, 79-80 (1st Cir., 2000). U.S. courts have also rejected the argument that a conflicting state law rendered an arbitration agreement "null and void, inoperative or incapable of being performed," under Article II(3) noting that "by acceding to the treaty, the federal government has insisted that not even the parochial interests of the nation may be the measure of interpretation." *See, e.g.,* Ledee v. Ceramiche Ragno, 684 F.2d 184, 187 (1st Cir., 1982).

<sup>49</sup> Report of December 2010 WG, *supra* note 16 at para. 52.

<sup>50</sup> Note by the Secretariat, Online dispute resolution for cross-border electronic commerce transactions: issues for consideration in the conception of a global ODR framework, UN Doc. A/CN.9/WG.III/WP.110, para. 43 (2011) (emphasis added). *See also, e.g.,* A. van den Berg, *The New York Arbitration Convention of 1958*, 126 (1981) ("A systematic interpretation of the Convention, in principle, permits the application by analogy of the conflict rules of article V(1)(a) to the enforcement of the agreement. It would appear inconsistent at the time of the enforcement of the award to apply the Convention's uniform conflict rules and at the time of

Accordingly, under the New York Convention, absent an express choice-of-law provision designating the law of the consumer's home jurisdiction, the law where the consumer is located is only relevant and applicable to an assessment of arbitral agreements and awards when such agreements or awards are sought to be recognized or enforced and, in the case of awards, annulled, in that jurisdiction.

The regional proposal appears to require states to decline to recognize otherwise valid arbitration agreements involving consumers from certain states, without regard to differing state views on the law governing the substantive validity of the arbitration agreement. As such, the regional proposal would result in either conflicting interpretations of the New York Convention or an inappropriate effort to have some states' national law exceptions applied by other states.<sup>51</sup> If a State does require domestic litigation of disputes notwithstanding an agreement to arbitrate, based on a view that such disputes are non-arbitrable that State's application of the non-arbitrability doctrine under Article II or V(2) is not binding on other States.<sup>52</sup> No matter their domestic operation, those domestic laws should not govern whether the Rules apply in the first instance in an international transaction.<sup>53</sup>

Regardless, there has been no suggestion in the regional proposal, that consumer agreements constitute a "subject matter" not capable of arbitration under Article II(1). Indeed, even under the regional proposal, consumers would be permitted to arbitrate disputes after those disputes have arisen.

For these reasons, in our view, the regional proposal would cause confusion with the mandate of UNCITRAL as it may operate inconsistently with the provisions of the New York Convention regarding which jurisdiction's law applies to the substantive validity or non-arbitrability of arbitration agreements. Moreover, if an UNCITRAL initiative were to append to the Rules a list of states that assert broad party incapacity to enter into binding arbitration agreements, that effort would implicitly endorse those states' interpretation of substantive validity or non-arbitrability, particularly since the list itself would be maintained by UNCITRAL. If there are differing interpretations of the New York Convention and differing national standards regarding the substantive validity or non-arbitrability of arbitral agreements, it would be inappropriate for an UNCITRAL soft law instrument that creates

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enforcement of the agreement to apply possibly different conflict rules of the forum."); J. Lew, L. Mistelis and S. Kröll, *Comparative International Commercial Arbitration*, paras. 6-54, 6-55 (2003) ("Though these provisions [i.e., New York Convention, Article (V)(1) and UNCITRAL Model Law, Article 36(1)(a)(i)] address the issue only from the perspective of the annulment or enforcement judge, there is a strong argument in favor of applying the same criteria at the pre-award stage.").

<sup>51</sup> See Born, *International Commercial Arbitration*, *supra* note 13 at 827 ("there is a compelling argument that the invalidation of all pre-dispute consumer arbitration agreements ... is contrary to Article II's requirement of neutrality for Rules of contractual validity.").

<sup>52</sup> See Born, *International Commercial Arbitration*, *supra* note 28, at 840-841 ("The non-arbitrability doctrine is an exception, contrary to the uniform choice of law regime established by Article V(1)(a) and contrary to the Convention's objectives, which should be applied with restraint, in a narrowly-tailored and non-idiosyncratic fashion, and generally not on an interlocutory basis (e.g., prior to the final award). Moreover, consistent with an appropriate choice-of-law analysis, national courts should not apply foreign non-arbitrability rules (save in unusual cases), and should instead give effect to Article V(1)(a)'s choice of law regime. Even if a State is permitted to adopt local non-arbitrability rules as an escape device, other Contracting States in general should not give such rules effect.") (footnotes omitted); See also Working Group III (Online Dispute Resolution, (Vienna, 14-18 November 2011), UN Doc. A/CN.9/739, para. 28).

<sup>53</sup> In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, *supra*, the U.S. Supreme Court specifically concluded (473 U.S. at 629) "that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context." The Court noted that it had in an earlier decision "paid heed to the Convention delegates 'frequent[ly] voiced' concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements.' ..., citing G. Haight, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Summary Analysis of Record of United Nations Conference*, May/June 1958, pp. 24-28 (1958)."

contractual rules for private parties to purport to resolve those differences by effectively endorsing the position of only one group of states.

In short, the regional proposal would not contribute to the establishment of a harmonized legal framework for the fair and efficient settlement of international cross-border high-volume low-value e-commercial disputes. Instead, it could open a gateway into an inconsistent and arguably improper interpretation and application of the New York Convention. The proper treatment of mandatory domestic law is in Article 1(3) of the UNCITRAL 2010 Arbitration Rules, which while ultimately giving proper effect to the laws of those countries whose laws limit consumers' capacity to enter into agreements to arbitrate, would not give rise to such New York Convention problems.

## **VII. Conclusion**

The revisions to the Rules proposed at the last session of the Working Group will not create an enabling legal environment for micro and small businesses to reach international markets through electronic commerce, given the tension between different conceptions about judicial jurisdiction and the practical impossibility of resolving high-volume, low-value cross-border disputes in court. The Rules should not simply reflect the views of countries from a particular region where judicial remedies may be available for parties from that region but not to parties from outside that region.

The Working Group should again be directed to address the need for the Rules to include final and binding arbitration, particularly for parties in under-developed and developing countries and countries in post-conflict situations where basic legal frameworks are absent or ineffectual. Additionally, the Commission should approve a fall 2013 meeting on Online Dispute Resolution (ODR) immediately following the meeting on arbitration in order to facilitate assigning a portion of the ODR meeting to the question of consistency of the proposed Rules for ODR with international arbitration law and practice.



**E. Report of Working Group on Online Dispute Resolution on the  
work of its twenty-ninth session (New York, 24-28 March 2014)**

(A/CN.9/801)

[Original: English]

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## I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution (ODR) relating to cross-border electronic commerce transactions.
2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reaffirmed the mandate of Working Group III relating to cross-border electronic commerce transactions,

including B2B and B2C transactions.<sup>1</sup> The Commission decided *inter alia* at that session that, in general terms, in the implementation of its mandate, the Working Group should also consider specifically the impact of its deliberations on consumer protection and that it should report to the Commission at its forty-fifth session.<sup>2</sup>

3. At its forty-fifth session (New York, 25 June-6 July 2012), the Commission reaffirmed the mandate of the Working Group in respect of low-value, high-volume cross-border electronic commerce transactions, and the Working Group was encouraged to continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, and to continue to conduct its work in the most efficient manner possible.<sup>3</sup> It was further agreed that the Working Group should consider and report back at a future session of the Commission on how the draft rules would respond to the needs of developing countries and those facing post-conflict situations, in particular with regard to the need for an arbitration phase to be part of the process; and that the Working Group should continue to include in its deliberations the effects of online dispute resolution on consumer protection in developing and developed countries and countries in post-conflict situations.<sup>4</sup> The Commission furthermore requested the Working Group to continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, including arbitration and possible alternatives to arbitration.<sup>5</sup> At its forty-sixth session, the Commission unanimously confirmed the decisions made at its forty-fifth session.<sup>6</sup>

4. The most recent compilation of historical references regarding the consideration by the Commission of the work of the Working Group can be found in document A/CN.9/WG.III/WP.126, paragraphs 5-15.

## II. Organization of the session

5. Working Group III (Online Dispute Resolution), which was composed of all States members of the Commission, held its twenty-ninth session in New York, from 20 to 24 March 2014. The session was attended by representatives of the following States members of the Working Group: Algeria, Austria, Brazil, Bulgaria, Canada, China, Colombia, Croatia, Germany, Greece, Hungary, India, Indonesia, Israel, Iran (Islamic Republic of), Japan, Mexico, Nigeria, Malaysia, Pakistan, Paraguay, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey and United States of America.

6. The session was also attended by observers from the following States: Czech Republic, Egypt, Libya, Malta, Netherlands, Romania, Saudi Arabia and United Arab Emirates.

7. The session was also attended by observers from the United Nations Office of Legal Affairs.

8. The session was also attended by observers from the following inter-governmental organizations: European Union (EU) and League of Arab States (LAS).

9. The session was also attended by observers from the following non-governmental organizations: American Arbitration Association (AAA), American Bar Association (ABA), Center for International Legal Education, University of Pittsburgh (CILE), Construction Industry Arbitration Council (CIAC), Corporate Counsel International Arbitration Group (CCIAG), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), Institute of International Commercial Law (IICL), Inter-American Commercial Arbitration Commission (IACAC), International Bar Association (IBA), Moot Alumni Association (MAA), National Centre for Technology and Dispute Resolution (NCTDR), New York State Bar Association (NYSBA), Penn State Dickinson School of Law, Queen Mary University

<sup>1</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 218.

<sup>2</sup> *Ibid.*, para. 218.

<sup>3</sup> *Ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 79.

<sup>4</sup> *Ibid.*, para. 79.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*, *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 222.

of London School of International Arbitration and European Law Students' Association (ELSA).

10. The Working Group elected the following officers:

*Chairman:* Mr. Soogeun OH (Republic of Korea)

*Rapporteur:* Ms. Martha CARRILLO (Mexico)

11. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.126);

(b) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (A/CN.9/WG.III/WP.127 and Add.1); and

(c) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft guidelines (A/CN.9/WG.III/WP.128).

12. The Working Group adopted the following agenda:

1. Opening of the session.

2. Election of officers.

3. Adoption of the agenda.

4. Consideration of online dispute resolution for cross-border electronic commerce transactions: draft procedural rules.

5. Other business.

6. Adoption of the report.

### III. Deliberations and decisions

13. The Working Group resumed its work on agenda item 4 on the basis of notes prepared by the Secretariat (A/CN.9/WG.III/WP.127 and its addendum; A/CN.9/WG.III/WP.128). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. At the closing of its deliberations, the Working Group requested the Secretariat to prepare a revised draft of procedural rules on online dispute resolution (the "Rules") based on deliberations and decisions of the Working Group, and in that respect, to make the necessary drafting adjustments to ensure consistency of language in the text of the Rules.

## IV. Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules

### A. General remarks

14. The Working Group affirmed its wish to ensure that the work it was undertaking took into account current ODR practice and possible future developments. It was recalled that at its twenty-eighth session the Working Group acknowledged that the Rules, when complete, will proceed into a real world setting where they would be accepted, or not, by industry, including merchants and consumers, and that as such ought to be drafted in order to be usable, practical and acceptable in that setting. It was also said that it was important that the Rules could work in different legal environments, given that they are intended to be used in cross-border e-commerce transactions.

15. The Working Group also affirmed that due process, transparency, accountability and impartiality of the actors should form an integral part of the Rules being described.

*ODR provider, ODR platform and ODR administrator*

16. The Working Group considered the nature of existing online dispute resolution practices and whether the draft Rules' distinction between ODR providers and ODR

platforms reflected that practice, and accommodated possible future permutations of ODR practice (see A/CN.9/WG.III/WP.127, paras. 10-13).

17. It was said that centralizing the concept by using the term “ODR administrator” would best capture existing practice as well as provide for flexibility in relation to the evolution of ODR systems.

18. A second suggestion was made to have a definition that addressed both an administrator and a platform, in order to ensure that all communications in the Rules took place via the platform.

19. Another suggestion was made to include different definitions for “ODR platform” and “ODR provider” on the basis that the underlying responsibilities and actions of the different entities ought to be transparent to users of the Rules. In response it was said that decentralizing terms in that way was less technologically neutral than a single, flexible term that could accommodate technological developments. It was also said that defining an “ODR administrator” that was ultimately responsible for providing a service need not define what that administrator does as its back-end functions.

20. In relation to transparency, the view was expressed that the concept was critical in disputes involving consumers, but that in practice that was unrelated to the functions of a provider or platform (see para. 19 above). It was said that transparency was critical as regards, namely: (i) the clear identification at the outset of a dispute as to how that dispute would be resolved and who would be resolving that dispute; and (ii) the nature of the outcome of the dispute (e.g. as binding or otherwise).

21. It was said in support of a proposal for ensuring that the Rules retained a technologically neutral approach that the Rules ought not to be overly prescriptive in defining the technological methodology. Moreover, it was said that in practice the terms “ODR platform” and “ODR provider” were not used in the online dispute resolution field and that it was difficult to provide a clear and distinct definition for those terms.

22. The Working Group agreed to consider that matter further (see paras. 49-54 below).

#### *Concurrent proceedings*

23. It was said that the Rules currently contained provisions in draft articles 4A and 4B (paras. (4)(e) and (2)(d) respectively) to the effect that parties were not pursuing additional judicial remedies. It was suggested to delete those provisions in relation to Track II of the Rules, given that those provisions could in any event provide no comfort to the other party in law that another proceeding was not in fact being initiated.

24. Support was expressed for that proposal. It was also said that in the interests of transparency it might be advisable for a party to give notice of the initiation of any other proceedings to the other party in an ODR proceeding.

25. In that respect, it was suggested to include the words “and also information in relation to the pursuit of other legal remedies” at the end of paragraph (5) of article 4A and paragraph (3) of article 4B. After discussion, that proposal was agreed (see also paras. 83 and 85 below).

26. It was furthermore agreed to delete paragraphs (4)(e) of article 4A, and paragraph (2)(d) of article 4B (see also paras. 76 and 85 below).

#### *State of current practice in online dispute resolution*

27. A reference was made to the request of the Working Group at its twenty-eighth session (A/CN.9/795, para. 18) that the Secretariat prepare a report in relation to current practices in the online dispute resolution field in order to ensure that the work being undertaken by the Working Group remained relevant with existing frameworks.

28. The Secretariat reported that it had consulted informally with experts from multiple regions and with diverse practitioner and academic experience in relation to existing ODR practices and the implications of those practices for the Rules. The Secretariat explained that key points in relation to those consultations included: (i) the belief that both consumer and business groups around the world are unanimous in seeking fair, proportionate, effective, online, cross-border redress for low value cross-border disputes; (ii) that online dispute

resolution already exists, and that even when the Rules were complete, they would be voluntary in nature and thus must accord with real life practice in order to be used in a commercial context; (iii) that there is a risk that overly prescriptive Rules would not be used in practice; (iv) that ODR administrators, marketplaces, and payment providers would in practice want the flexibility to design, build, and deploy both non-binding and binding ODR systems; (v) that tracking consumers and transactions on the basis of nationality and legal jurisdiction at the outset of a transaction would be very difficult for e-commerce merchants and marketplaces, and that additional requests for information in an online business transaction could result in the loss of customers; (vi) that the Internet is borderless, and applying different sets of procedural rules depending on the nationality of one disputing party would be commercially impractical for ODR entities and unlikely to happen in practice; and finally, (vii) that higher level process requirements or values (e.g. due process, transparency, impartiality) and limits as to when the rules apply, could provide a sound basis on which ODR administrators could design ODR systems that could best meet the needs of various disputes, marketplaces, and consumer communities.

29. In particular, it was emphasized by experts that there was a great need to develop fair, transparent dispute resolution processes that would provide access to justice for the broadest spectrum of consumers, and that overly prescriptive Rules might hamper that aim by creating a system that was unworkable in practice.

30. In response to the points set out in paragraphs 28-29 above, it was clarified that these were opinions expressed by experts, but that the ultimate decision-making in relation to the Rules lay with the Working Group. It was also said that further expert input could be useful in satisfying the request of the Working Group at its twenty-eighth session for the Secretariat to consult in relation to current ODR practice. It was also said that the benefit of the Rules was their ability to set a global reference standard that addressed differences in national law. It was furthermore observed that in a global standard, a certain level of detail could not be avoided.

31. In relation to specific questions posed in respect of current practice, it was said that the average value of transactions resolved by ODR in some marketplaces (the example was given of eBay) was approximately 75 USD for cases involving items not received and 100 USD for cases involving goods not as described, within a time frame of 10-16 days on average; another example was given of the Mexican online dispute resolution program of the national consumer protection agency (Concilianet), which was said to resolve cases with an average value of 300 USD within a time frame of 28 days. It was also said that a variety of processes existed for resolving disputes in different ODR systems, ranging from crowd-sourcing to algorithmic resolutions of disputes.

32. By way of conclusion, it was observed that the Working Group had expressed the view that the Rules ought to be as practical as possible in a global context, and it was important to find a balance and to bear in mind the existing practice of online dispute resolution, and to design Rules that could encompass that practice and permit the evolution of practice.

#### *Twenty-ninth session*

33. It was proposed to proceed by considering Track II of the Rules, as contained in document A/CN.9/WG.III/WP.127 and its addendum.

## **B. Notes on draft procedural rules**

### **1. Draft article 1 (Scope of application)**

34. The Working Group considered draft article 1 as contained in paragraph 29 of document A/CN.9/WG.III/WP.127.

#### *Paragraph (1)*

35. The Working Group considered whether the term “transaction” was sufficiently clear, or whether the phrase “contract concluded or performed using electronic communications” might be clearer (A/CN.9/WG.III/WP.127, paras. 8 and 32).

36. The view was expressed that replacing the words “transaction conducted by use of electronic communications” in paragraph (1) with “sales or service contract concluded using electronic communications” would lend greater clarity to the provision. After discussion, that proposal was agreed.

*Paragraph (1)(bis)*

37. The Working Group recalled its discussions regarding whether paragraph (1)(bis) might relate more appropriately to Track I proceedings than to simplified Track II proceedings where such formality might not be required (A/CN.9/795, para. 34).

38. A suggestion was made to: (i) remove the square brackets surrounding the provision as a whole, on the basis that the considerations therein are equally important in a Track II proceeding as in a Track I proceeding; (ii) add the words “and independent” between “separate” and “from” to further emphasize that the agreement to use the Rules should be an independent one; (iii) delete the words “to the buyer” following the phrase “notice in plain language”; and (iv) delete the square brackets around the word “and”.

39. In relation to point (i) in paragraph 38 above, it was said that in practice, requiring a separate click from purchasers for additional contractual terms often led to a reduced number of transactions, and hence would be unlikely to be implemented by merchants. It was said in response that paragraph (1)(bis) ought to remain in the text as it provided an important consumer protection mechanism.

40. In relation to point (ii) in paragraph 38 above, it was said that adding the words “and independent” was redundant given the existing requirement for agreement under paragraph (1)(bis) to be “separate” from the transaction.

41. Some support was given to a proposal to retain the square brackets around the words “and whether Track I or Track II of the Rules apply to that dispute” pending the further consideration of Track I. Another suggestion was made to delete that text, and likewise to delete it where it appeared in Track I of the Rules.

42. A suggestion was made to replace the term “proceedings under the Rules” with the phrase “proceedings under these Rules”.

43. After discussion, it was agreed to delete the square brackets around the entirety of the text of paragraph (1)(bis) and retain the language therein with the following modifications: (i) to delete the square brackets around the word “and” (see para. 38 above); (ii) to delete the words “to the buyer” (see para. 38 above); (iii) to add the words “and independent” after the word “separate” (see para. 40 above); (iv) in the fourth line, to replace the words “the Rules” with the phrase “these Rules” (see para. 42 above); and (v) to retain the internal square brackets and text therein (see para. 41 above).

44. Consequent to that agreement, paragraph (1)(bis) would read as follows: “Explicit agreement referred to in paragraph (1) above requires agreement separate and independent from that transaction, and notice in plain language that disputes relating to the transaction and falling within the scope of the Rules will be resolved through ODR proceedings under these Rules [and whether Track I or Track II of the Rules apply to that dispute] (the ‘dispute resolution clause’)”.

*Paragraph (2)*

45. It was agreed to delete the square brackets around subparagraphs (a) and (b) of paragraph (2) and to permit the Secretariat to ensure that language was consistent with other provisions in paragraph (1). It was agreed that the language “at the time of the transaction” would be deleted pursuant to a decision of the Working Group at its twenty-eighth session (A/CN.9/795, para. 41).

*Paragraph (3)*

46. After discussion, it was agreed to retain paragraph (3) in the form set out at paragraph 29 of document A/CN.9/WG.III/WP.127.

## 2. Draft article 2 (Definitions)

47. The Working Group considered draft article 2 as contained in paragraph 38 of document A/CN.9/WG.III/WP.127.

### *Paragraph (1)*

48. After discussion, it was agreed to retain paragraph (1) in the form set out at paragraph 38 of document A/CN.9/WG.III/WP.127.

### *Paragraphs (2) and (3)*

49. The Working Group recalled its discussion in relation to the terms “ODR platform”, “ODR provider” and “ODR administrator” (see paras. 16-22 above).

50. It was said that the term “ODR administrator” could better encompass the different types of entities undertaking a function of administering ODR without prescribing the nature of the entity providing the service. It was further suggested that in addition to a definition of “ODR administrator”, it was important to retain the term “ODR platform” in order to ensure that the Rules clearly expressed that communications were to take place via a platform rather than, for example, in hard copy.

51. In relation to the need to differentiate liability of different entities, an example was given of a dispute resolution system that encompassed servers, neutrals and administrators all located in different jurisdictions, but where the ultimate liability rested with a central entity. It was said that the term “ODR administrator” was preferable in light of that type of example given the breadth of that term in practice, and that it might also eliminate the need to define “ODR platform” separately.

52. In response, a view was expressed that “ODR platform” was an important component of an ODR process and consequently ought to be included in the Rules. A new definition for that term was proposed as follows: “‘ODR platform’ means a system for generating, sending, receiving, storing, exchanging or otherwise processing communications under these Rules.”

53. It was said that it was important to link the discussion of an “ODR administrator” with article 12 of the Rules in relation to the entity specified in the dispute resolution clause. With that in mind, a new definition for the term “ODR administrator” was proposed as follows: “‘ODR administrator’ means the entity that administers and coordinates ODR proceedings under these Rules, including where appropriate, by administering an ODR platform, and which is specified in the dispute resolution clause”.

54. After discussion, it was agreed that the definitions of “ODR administrator” and “ODR platform” as set out in paragraphs 52 and 53 above would replace the definitions set out in options 1, 2 and 3 of paragraph (1) of article 2 (para. 38 of document A/CN.9/WG.III/WP.127), and that the term “ODR provider” and all references thereto would be deleted from the Rules.

### *Paragraphs (4), (5) and (6)*

55. After discussion, it was agreed to retain paragraphs (4), (5) and (6) as set out in paragraph 38 of document A/CN.9/WG.III/WP.127.

### *Paragraph (7)*

56. After discussion, it was agreed that option 1 in relation to paragraph 7, setting out a consolidated definition of “communication”, should be used to define that term in the Rules.

### *Electronic address*

57. A suggestion was made to define “electronic address” or “designated electronic address” in the Rules. One suggestion was made to define the latter term as follows: “‘Designated electronic address’ means the electronic address designated by each party and by the ODR administrator for the purposes of exchanging communication under these Rules”.

58. The Working Group recalled that the United Nations Convention on the Use of Electronic Communications in International Contracts contained some guidance in relation to the term “electronic address” at paragraph 185 of the explanatory note thereto (see A/CN.9/WG.III/WP.127).

59. After discussion, it was agreed that the Rules ought to contain a definition of the term “electronic address” and the Secretariat was requested to include language in that respect in the next iteration of the Rules, taking into account existing usage of that term in UNCITRAL texts.

### 3. Draft article 3 (Communications)

60. The Working Group considered draft article 3 as contained in paragraph 46 of document A/CN.9/WG.III/WP.127.

#### *Paragraphs (1), (2) and (3)*

61. A proposal was made to replace paragraph (1) as follows: “All communications in the course of ODR proceedings shall be communicated to the ODR administrator via the ODR platform. The electronic address of the ODR platform to which documents must be submitted shall be specified in the dispute resolution clause.”

62. It was suggested to add an additional sentence to the end of paragraph (1) as set out in paragraph 61 above, as follows: “Each party shall provide the ODR administrator with an electronic address to be used for communications”. It was said that that change would enable the deletion of paragraphs (2) and (3).

63. A concern was raised that deleting paragraphs (2) and (3) would have the consequence of eliminating language providing for parties to update their electronic addresses. In response, it was said that the language proposed in paragraph 62 above was broad enough to encompass the provision of updated electronic addresses by the parties.

64. After discussion, it was agreed that paragraph (1) would be redrafted pursuant to the proposals set out in paragraphs 62-63 above, and that paragraphs (2) and (3) would be deleted.

#### *Paragraph (4)*

65. After discussion, it was agreed that the second sentence of paragraph (4) would be better placed in draft article 11, and the Secretariat was requested to relocate that provision accordingly (A/CN.9/WG.III/WP.127, para. 51).

#### *Paragraph (5)*

66. A suggestion was made to replace paragraph (5) as follows: “The ODR administrator shall promptly acknowledge receipt of any communications by a party or the neutral at their electronic addresses.” After discussion, that proposal was agreed.

#### *Paragraph (6)*

67. A suggestion was made to replace paragraph (6) as follows: “The ODR administrator shall promptly notify a party or the neutral of the availability of any communication directed to that party or the neutral at the ODR platform.” After discussion, that proposal was agreed.

#### *Paragraph (7)*

68. After discussion, it was agreed to retain paragraph (7) in the form set out at paragraph 46 of document A/CN.9/WG.III/WP.127.

### 4. Draft article 4A (Notice)

69. The Working Group considered draft article 4A as contained in paragraph 52 of document A/CN.9/WG.III/WP.127.



*Paragraph (1)*

70. After discussion, it was agreed to retain paragraph (1) as set out in paragraph 52 of document A/CN.9/WG.III/WP.127.

*Paragraph (2)*

71. A proposal was made to delete the first sentence, and retain the second sentence, of paragraph (2). A view was expressed that that paragraph was redundant in light of paragraph (6) of draft article 3 (see para. 67 above). In response, it was said that it was important for explicit provision to be made for the respondent to be notified following the submission of a notice by a claimant. After discussion it was agreed to retain the second sentence without square brackets, and to delete the text of the first sentence of that paragraph, such that it would read: “The ODR provider shall promptly notify the respondent that the notice is available at the ODR platform.”

*Paragraph (3)*

72. General support was expressed for option 1. A suggestion was made to replace the language set out in option 1 as follows: “ODR proceedings shall be deemed to commence when, following communication to the ODR administrator of the notice pursuant to paragraph (1), the ODR administrator notifies the parties of the availability of the notice at the ODR platform.”

73. After discussion, the language as set out in paragraph 72 above was agreed.

*Paragraph (4)**Subparagraphs (a) and (b)*

74. After discussion, it was agreed to (i) retain the phrase “electronic address” in subparagraph (a); and (ii) delete the word “designated” in subparagraphs (a) and (b). In all other respects it was agreed to retain the language of subparagraphs (a) and (b) as contained in paragraph 52 of document A/CN.9/WG.III/WP.127.

*Subparagraphs (c) and (d)*

75. After discussion, it was agreed to retain the text of subparagraphs (c) and (d) as contained in paragraph 52 of document A/CN.9/WG.III/WP.127.

*Subparagraph (e)*

76. The Working Group recalled its decision to delete subparagraph (e) (see above, paras. 23-26).

*Subparagraph (f)*

77. No objections were raised to the language in subparagraph (f) and consequently it was agreed to retain the language as contained in paragraph 52 of document A/CN.9/WG.III/WP.127.

*Subparagraph (g)*

78. After discussion, it was agreed to retain subparagraph (g) in the form set out at paragraph 52 of document A/CN.9/WG.III/WP.127 (see also below, para. 157).

*Subparagraph (h)*

79. It was proposed to delete the phrase “including any other identification and authentication methods” (A/CN.9/WG.III/WP.127, para. 62) on the basis that that text was redundant with the term “signature”, which, as used in UNCITRAL texts on e-commerce included other identification and authentication methods. Support was expressed for that proposal.

80. In response, concerns were raised that the terms “signature” and “electronic signature” were not clear for consumers. A proposal was made to include examples of electronic signatures in the Rules or in the commentary.

81. Another suggestion was made to use the term “electronic signature” in lieu of the term “signature”.

82. After discussion, it was agreed to retain the language as set out in paragraph 52 of document A/CN.9/WG.III/WP.127, to retain the language “and/or the claimant’s representative” and delete the square brackets around those words. Another proposal was made to replace references in the Rules to “signature” (in article 4A(4)(h), and article 4B(2)(g)) with the phrase “signature or other means of identification and authentication”. After discussion, that proposal was agreed.

*Paragraph (5)*

83. The Working Group recalled its decision to add the words “and also information in relation to the pursuit of other legal remedies” at the end of paragraph (5) (para. 25, above). In all other respects it was agreed to retain the language of paragraph (5) as contained in paragraph 52 of document A/CN.9/WG.III/WP.127.

**5. Draft article 4B (Response)**

84. The Working Group considered draft article 4B as contained in paragraph 65 of document A/CN.9/WG.III/WP.127.

85. After discussion, it was agreed to make consequential changes to article 4B to retain consistency with the changes made in article 4A (see paras. 23-26 and 69-83 above, and para. 157 below). In all other respects it was agreed to retain the text of article 4B as contained in paragraph 52 of document A/CN.9/WG.III/WP.127.

**6. Draft article 4C (Counterclaim)**

86. The Working Group considered draft article 4C as contained in paragraph 67 of document A/CN.9/WG.III/WP.127. After discussion, it was agreed to retain that article in the form set out therein.

**7. Draft article 5 (Negotiation)**

87. The Working Group considered draft article 5 as contained in paragraph 70 of document A/CN.9/WG.III/WP.127.

*General*

88. A proposal was made that commentary or guidelines to the Rules indicate, in relation to a negotiation stage, that an ODR administrator should give a description to parties of what types of technical programmes it uses and the way negotiation will be conducted — for example, whether algorithms would be used.

89. It was agreed to include such an indication in guidelines or commentary. It was further agreed to retain article 5 in the form set out in paragraph 70.

**8. Draft article 6 (Facilitated settlement)**

90. The Working Group considered draft article 6 as contained in paragraph 77 of document A/CN.9/WG.III/WP.127.

*Paragraph (1)*

91. After discussion, it was agreed to retain paragraph (1) in the form set out in paragraph 77 of document A/CN.9/WG.III/WP.127.

*Paragraphs (2) and (3)*

92. It was proposed that in paragraph (2), language be inserted such that the ODR administrator would be required to give notice to the disputing parties of the ten-day deadline specified in paragraph (3). That proposal was accepted, and the Secretariat was requested to insert language in that respect, and to make any consequential changes required in paragraph (3).

## 9. Draft article 7 (Recommendation by a neutral)

93. The Working Group considered draft article 7 as contained in paragraph 82 of document A/CN.9/WG.III/WP.127.

### *Paragraphs (1)-(3)*

94. After discussion, it was agreed to retain paragraphs (1) to (3) in the form set out in paragraph 82 of document A/CN.9/WG.III/WP.127.

### *Paragraph (4)*

95. The view was expressed that the second sentence of paragraph (4) ought to be retained. It was said in support of that view that that sentence improved clarity and legal certainty. It was further explained that that sentence encapsulated the essence of what distinguished Track II from Track I, namely that the outcome of the former did not have a *res judicata* effect. Nonetheless, it was said that Track II could be coupled with mechanisms that would encourage compliance, and that the Rules ought to state that possibility explicitly.

96. In response, it was said that the second sentence of paragraph (4) was not appropriate in procedural rules and would be better placed in commentary or guidelines.

97. A proposal was made to replace the second sentence as follows: “The ODR administrator may introduce the use of trustmarks or other methods to identify and encourage compliance with recommendations”.

98. After discussion, a second proposal, intended to replace the entirety of paragraph (4), and taking into account the proposal set out in paragraph 97 above, was made as follows (“the second proposal”): “The recommendation shall not be binding on the parties. However, a party or both parties may commit to comply with the recommendation. The ODR administrator may introduce mechanisms to encourage compliance with the recommendation.” It was suggested that in addition to that proposal, it would be helpful to insert in the preamble to Track II, language that would make it clear that the recommendation under Track II would not produce a *res judicata* effect.

99. In support of the second proposal, it was said that it included generic language that was open in relation to the point in time at which agreement was required, and that it provided for a commitment by one or both parties to comply with the recommendation.

100. It was suggested to modify the last sentence of the second proposal so that it would read as follows: “Mechanisms to encourage compliance with the recommendation may be introduced.”

101. A question was raised as to the legal effect intended when the disputing parties agreed to comply with the recommendation, and specifically whether that would produce a contractual agreement that could be enforced. It was said that if that were the case, it might be advisable to link such an agreement to the provision on settlement (draft article 8). Another view was expressed that it was important to retain a distinction between settlement and an agreement to comply with a recommendation.

102. It was said that the second proposal raised a number of technical and substantive concerns. It was said that the language reduced transparency for disputing parties, by enabling two different possible outcomes: a non-binding process, and a binding process capable of ending in an outcome enforceable by a court. It was also said that the concept of including mechanisms that would encourage compliance with a recommendation in a non-binding process was problematic insofar as it could be viewed as coercive. It was moreover said that the intention of the proposal to enable, at least in some instances, a binding outcome enforceable in court, was similar to a Track I outcome and as such raised a question regarding different attitudes toward the two tracks, as reflected in negative terminology and additional requirements proposed for Track I in document A/CN.9/WG.III/WP.123, article 1A and article 1(3), option 1.

103. In response to those concerns, it was said that it was clear that Track II does not lead to a result that would be enforceable before the courts. A distinction was made between a traditional court proceeding, ending in an outcome that could be enforced, and a Track II proceeding, which ended in a recommendation that could not be enforced in the courts, and

which was not equivalent to such a court decision. It was furthermore said that an agreement between disputing parties to abide by a recommendation would not make that recommendation enforceable in a court.

104. In response, it was said that an agreement to be bound by a recommendation did itself provide a basis for initiating court proceedings, and consequently a basis for initiating enforcement proceedings. It was said in response that there was a fundamental difference between providing a basis for commencing court proceedings, and a basis for commencing enforcement proceedings.

105. It was said that in the context of low-value electronic commerce disputes, the likelihood of any party resorting to court was very low.

106. After discussion, it was concluded that the language as set out in paragraph 82 of A/CN.9/WG.III/WP.127 would be retained as option 1, and the language set out in paragraph 98 above, as option 2.

#### *Timing of agreement*

107. In relation to the specification in paragraph (4) that the recommendation shall not be binding on parties “unless they otherwise agree”, a proposal was made to require that agreement to take place before a recommendation had been communicated. In response, it was said that leaving the timing of such agreement open provided for greater flexibility in the dispute, and furthermore the form in which that agreement was given could be determined by the ODR administrator.

#### *Conclusion*

108. It was agreed that the recommendation as provided for in article 7 of Track II was intended to have a non-binding effect. In relation to the effect of an agreement to comply with a recommendation, it was said that the Working Group had expressed different views both on the legal nature of that agreement and the relative importance of the stage of court proceedings it might trigger, and that that issue deserved further discussion. Finally it was observed that in relation to a compliance mechanism referred to in the second proposal, that whether such a mechanism ought to be addressed in the Rules, and if so, the location of such a reference, remained a matter for further consideration.

### **10. Draft article 8 (Settlement)**

109. The Working Group considered draft article 8 as contained in paragraph 88 of document A/CN.9/WG.III/WP.127. After discussion, it was agreed to retain that article in the form set out therein.

### **11. Draft article 9 (Appointment of a neutral)**

110. The Working Group considered draft article 9 as contained in paragraph 1 of document A/CN.9/WG.III/WP.127/Add.1.

#### *General*

111. A view was expressed that, in view of the discussion set out in paragraphs 27-32 above, article 9, as well as other articles in the Rules, could be further streamlined, particularly in relation to deadlines specified. It was clarified that the deadlines in the Rules would be reconsidered in their entirety at a later stage (see paras. 165-166 below).

#### *Paragraph (1)*

112. A proposal was made in relation to paragraph (1) to replace the words “and any other relevant or identifying information in relation to that neutral” with the phrase “and of the information in relation to that neutral as set out in points [...] of the Guidelines and Minimum Requirements for Neutrals”. It was said that specific guidance ought to be set out in relation to the information required to be provided to disputing parties in respect of each neutral, and that providing such information in guidelines for neutrals could create clarity in that respect.

113. In response, it was said that procedural rules should not rely on guidelines for specific information relevant to the functioning of those rules, and to include such a provision in the Rules would set an undesirable precedent for UNCITRAL texts.

114. After discussion, it was agreed that the Rules should be clear and understandable to users, and the Working Group agreed to consider further the matter of how to enunciate in the Rules themselves what information ought to be provided to disputing parties in respect of the neutral.

*Paragraphs (2)-(7)*

115. After discussion, it was agreed to retain paragraphs (2) to (7) as set out in paragraph 1 of document A/CN.9/WG.III/WP.127/Add.1.

*Paragraph (8)*

116. It was said that as an important provision, paragraph (8) ought to include language requiring the neutral to inform parties of the deadline in which they might object to the provision of information generated during the negotiation stage. That proposal received support.

117. After discussion, it was agreed that paragraph (8) would be retained in the form set out in paragraph 1 of document A/CN.9/WG.III/WP.127/Add.1, but that the Secretariat would add a general provision in the Rules to reflect that the neutral or ODR administrator should notify parties of all relevant deadlines during the course of proceedings.

*Paragraph (9)*

118. After discussion, it was agreed that paragraph (9) would be retained in the form set out in paragraph 1 of document A/CN.9/WG.III/WP.127/Add.1.

**12. Draft article 10 (Resignation or replacement of neutral)**

119. The Working Group considered draft article 10 as contained in paragraph 8 of document A/CN.9/WG.III/WP.127/Add.1. After discussion, it was agreed to retain that article as set out therein.

**13. Draft article 11 (Power of neutral)**

120. The Working Group considered draft article 11 as contained in paragraph 9 of document A/CN.9/WG.III/WP.127/Add.1.

*Paragraph (1)*

121. After discussion, it was agreed that paragraph (1) would be retained in the form set out in paragraph 9 of document A/CN.9/WG.III/WP.127/Add.1.

*Paragraph (1)(bis)*

122. After discussion, it was agreed that paragraph (1)(bis) would be retained in the form set out in paragraph 9 of document A/CN.9/WG.III/WP.127/Add.1.

*Paragraphs (2) and (3)*

123. A proposal was made to merge paragraphs (2) and (3) as follows: "Subject to any objections under article 9, paragraph (8), the neutral shall conduct the ODR proceedings on the basis of documents submitted by the parties, any communications made by them to the ODR administrator, and such other materials as the neutral may request or allow the parties to submit. The neutral shall determine time periods for the submission of such other materials." That proposal did not receive support.

124. In relation to paragraph (2), it was said that that paragraph was an important provision allowing each party to be heard and promoting a fair and transparent process. A query was raised as to whether that provision provided for a decision to be made only on the basis of communications that were transparent to both parties. In response, it was clarified that

paragraph (2) was subject to article 9(8), which permitted parties to object to the provision of communications to the neutral.

125. After discussion, it was agreed to retain paragraph (2) as set out in paragraph 9 of document A/CN.9/WG.III/WP.127/Add.1.

126. In relation to paragraph (3), it was suggested that allowing the neutral to request further information from the parties could burden the process, and a proposal was made to replace the word “request” in that paragraph with the word “allow”. In response, it was said that the principle of permitting the neutral to request additional documents was consumer protective, and provided the neutral with the discretion to suggest to parties that they may wish to submit a certain document.

127. After discussion, it was agreed to retain paragraph (3) as set out in paragraph 9 of document A/CN.9/WG.III/WP.127/Add.1.

#### *Paragraph (4)*

128. It was said that paragraph (4) was not necessary to include, on the basis that a competence-competence provision in relation to neutrals was not appropriate for simple, streamlined Rules. After discussion, it was agreed to delete paragraph (4).

#### *Paragraph (5)*

129. The Working Group recalled its decision to relocate the second sentence of article 3(4) (as set out in A/CN.9/WG.III/WP.127), to article 11 (see para. 65 above). That sentence read as follows: “The neutral may in his or her discretion extend any deadline in the event the addressee of any communication shows good cause for failure to retrieve that communication from the platform”.

130. A proposal was made to replace paragraph (5) with that sentence, but to modify that sentence to provide for greater flexibility such that the neutral would have a general power to extend any deadline without a need for a party to show good cause. A view was expressed that unlike the text set out in paragraph 129 above, paragraph (5) provided for a neutral to “make inquiries” in determining whether or not to extend deadlines, and that it was important to retain such a concept.

131. Consequently it was suggested that paragraph (5) be replaced with the following sentence: “The neutral, after making such inquiries as he or she may deem necessary, may, in his or her discretion, extend any deadlines under these Rules”. A view was expressed that the phrase “such inquiries as he or she may deem necessary” was vague, and that examples of what those inquiries might be could be set out in guidelines.

132. After discussion, the proposed language in paragraph 131 above was agreed, and it was furthermore suggested that examples of possible inquiries by a neutral be provided for in guidelines.

### **14. Draft article 12 (ODR provider)**

133. The Working Group considered draft article 12 as contained in paragraph 15 of document A/CN.9/WG.III/WP.127/Add.1.

134. It was said that both the ODR platform and the ODR administrator ought to be specified in the dispute resolution clause for purposes of transparency and accountability. After discussion, it was agreed that draft article 12 would read as follows: “The ODR platform and ODR administrator shall be specified in the dispute resolution clause.”

#### *Model dispute resolution clause*

135. A proposal was made to include, as an Annex to the Rules, a model dispute resolution clause. That proposal received support. In relation to the content of such a clause, it was said that it should address the essential functional elements of an ODR process. It was also said that a model clause should contain a link to the website of the ODR administrator, to provide for additional transparency for users.

136. As a general comment, it was suggested that at the time a buyer agreed to an ODR process, it would need information in plain language and in a language it could understand as to the detail of the process, all the steps involved in ODR proceedings, the language of the proceedings, and the outcome of the proceedings. It was said that while that information may not need to be in a model clause, it should be made available to buyers at the time of agreement to submit disputes to ODR under the Rules.

137. Delegations were invited to consult with a view to agreeing upon a draft model dispute resolution clause which would be considered at a later stage.

#### 15. Draft article 13 (Language of proceedings)

138. The Working Group considered draft article 13 as contained in paragraph 17 of document A/CN.9/WG.III/WP.127/Add.1.

139. It was said that a provision on language needed to be flexible, and sensitive to technology that was already being used to promote multilingual proceedings or to reduce language barriers, such as translation tools and pictograms. It was further suggested that an administrator would necessarily determine language, as a neutral would not in any event be appointed at the outset of ODR proceedings.

140. In response, a view was expressed that an ODR administrator ought not to have an unlimited choice of languages to choose from, and that the language of the offer of the underlying transaction — in other words, the language in which the merchant offered the goods or services to the purchaser — should be the language of the dispute resolution proceedings. A different view was expressed that concluding a transaction in a foreign language was often unproblematic, but that conducting dispute resolution proceedings would be much more complex.

141. A proposal was made to replace article 13 with the following language: “The proceedings shall be conducted in the language or languages which the parties understand and in which they are able to communicate.” It was said in support of that proposal that it did not give any discretion to an ODR administrator or neutral and that it implied that technology could be used to provide for multiple languages in the event parties did not have a common language. It was further said that additional guidance in relation to translation, including technical tools to assist with translation, could be set out in guidelines.

142. Concerns were expressed that that proposal did not provide for certainty that an ODR platform or administrator could accommodate the languages of the parties, and that it did not provide an initial reference point from which to offer proceedings. In that respect, it was suggested that the language of proceedings be linked to the language of the transaction or the contract.

143. A second proposal was made to replace article 13 in its entirety with the following language: “The ODR proceedings shall take place in the language of the underlying ODR agreement. In the event that a party indicates to the ODR administrator or neutral that it does not wish to proceed in that language, the ODR administrator or neutral shall identify other languages the parties can select for the proceedings. The proceedings shall then be conducted in the language or languages that the parties understand.” In support of that proposal, it was said that it provided for a language in which the ODR administrator or platform could commence proceedings, with a mechanism for parties to express a preference for another language if that initial choice was not acceptable. The desirability of including guidance in relation to translation and tools for translation was reiterated.

144. A concern was raised that parties ought to be able to know in advance of ODR proceedings which languages were available. Likewise, it was said that the dispute resolution clause might need to be provided to parties in a language that they understood.

145. Another view was expressed that existing online translation tools were not adequate and that a neutral or ODR administrator should select a common language to be used, such as that used in the transaction.

146. In response, it was said that the language of the transaction or the contract could serve as a default language for proceedings, but that parties to a dispute ought to have the

possibility to select a language in which they would be more comfortable conducting a dispute, if such a language was provided for by the ODR platform or administrator.

147. After discussion, another proposal was made in relation to article 13, as follows (the “third proposal”): “The ODR proceedings shall take place in the language of the offer for ODR proceedings accepted by the buyer. In the event that a party indicates in a notice or response that it wishes to proceed in another language, the ODR administrator shall identify available languages that the parties can select for the proceedings. The ODR proceedings shall be conducted in the language or languages that the parties select.”

148. It was said in support of the third proposal that it provided notice to the buyer of the language in which proceedings would be conducted, and likewise provided guidance in relation to the language to be used at the inception of proceedings, while allowing flexibility to parties to adjust their decision within the framework offered by the administrator during the course of proceedings. It was said that in the very small number of possibilities where one of the languages offered was not a language in which a party felt it could communicate, that was a matter best addressed in commentary.

149. Several modifications were proposed in relation to the language of the third proposal as set out in paragraph 147 above as follows. First, a proposal was made to replace, in the second sentence, the phrase “available languages that the parties can select for the proceedings”, with the phrase “a language or languages in which the parties can communicate”.

150. A different modification to the language of the third proposal was suggested as follows: (i) in the first sentence, to insert the word “indicated in the offer for ODR proceedings” in replacement of the words “of the offer for ODR proceedings”; and (ii) to merge the second and third sentences, by inserting the word “, and” between them. It was clarified that in relation to (i), the intention was to indicate in the dispute resolution clause the language in which proceedings would take place.

151. In response to the third proposal set out in paragraph 147 above, as well as the modifications thereto proposed in paragraph 150 above, it was said that requiring the language in which ODR proceedings were to take place to be specified in the dispute resolution clause would permit a merchant to offer transactions in one language (the language of the target market, for example) and mandate that dispute resolution proceedings would take place in another (the language, for example, of that merchant’s primary place of business). A concern was also raised that the draft text of the third proposal would not accommodate a situation in which an ODR administrator indicated languages that could be selected, but where a party refused or failed to select one of those languages.

152. An additional proposal was made to modify the text of the third proposal with the second modification proposed in paragraph 150 above, so that article 13 would read as follows: “The ODR proceedings shall take place in the language of the offer for ODR proceedings accepted by the buyer. In the event that a party indicates in a notice or response that it wishes to proceed in another language, the ODR administrator shall identify available languages that the parties can select for the proceedings, and the ODR proceedings shall be conducted in the language or languages that the parties select.”

153. Three concerns were raised in relation to that proposal. First, it was said that the term “offer for ODR proceedings accepted by the buyer” was ambiguous insofar as it appeared to be referring to the “dispute resolution clause” defined in article 1(1)(bis), and moreover, that the term “buyer” was not defined anywhere in the Rules.

154. Second, it was said that the Rules or guidelines should send a strong message to ODR administrators that they ought, under that provision, to make reasonable efforts to provide as broad a spectrum of languages as possible.

155. Third, it was said that the language in that proposal should ensure that it would capture the need for a complaint form to be provided in the language selected by the claimant.

156. It was furthermore suggested that further thought ought to be given as to whether the dispute resolution clause should specifically set out the languages in which the services ought to be provided.



157. After discussion, it was agreed that the language set out in paragraph 152 above would replace the entirety of article 13 as set out in paragraph 17 of A/CN.9/WG.III/WP.127/Add.1. It was furthermore clarified that the provisions on language in articles 4A(4)(g) and 4B(2)(f) would not require further modification (see above, paras. 78 and 85).

**16. Draft article 14 (Representation)**

158. After discussion, the Working Group agreed to retain article 14 in the form set out in paragraph 18 of document A/CN.9/WG.III/WP.127/Add.1.

**17. Draft article 15 (Exclusion of liability)**

159. A proposal was made to delete article 15 on the basis that such a waiver of liability in relation to ODR administrators and neutrals could be best placed in contractual arrangements that included those entities as parties. A reference was made to a mirror provision in Article 16 of the UNCITRAL Arbitration Rules 2010, which provided for exclusion of liability against relevant third parties in arbitration proceedings.

160. After discussion, it was agreed to delete article 15.

**18. Draft article 16 (Costs)**

161. A proposal was made to retain article 16 and to retain the word “decision”, in lieu of “award”, such that the provision would read as follows: “The neutral shall make no decision as to costs and each party shall bear its own costs.”

162. Consensus was recorded in relation to the principle that the winning party in ODR proceedings ought not to be able to reclaim its costs from the losing party.

163. After discussion, the language set out in paragraph 161 above was agreed.

*Fees*

164. A concern was expressed that the Rules did not currently address the need for fees levied by ODR administrators or platforms to be reasonable. It was agreed that a new provision could be included for consideration in that respect at a future session.

**19. Other matters**

*Timelines*

165. The Working Group recalled its decision to reassess the timelines in the Rules as a whole at the conclusion of its deliberations on Track II. In relation to timelines, it was suggested that a more generic, flexible approach that was not so prescriptive would be desirable. It was said that the Rules needed to be informative to potential users and also needed to give sufficient discretion to ODR administrators and neutrals to modify time frames as needed, on the understanding that a primary objective was to accommodate a fair and efficient process.

166. The Working Group agreed to consider that matter further at a later stage.

**C. Other business**

167. Several delegations expressed disappointment that document A/CN.9/WG.III/WP.125 had not been discussed during the course of the Working Group’s twenty-ninth session.

## F. Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules

(A/CN.9/WG.III/WP.127 and add.1)

[Original: English]

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### I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution (ODR) relating to cross-border electronic commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions.<sup>1</sup> At its forty-fourth (Vienna, 27 June-8 July 2011)<sup>2</sup> and forty-fifth (New York, 25 June-6 July 2012)<sup>3</sup> sessions, the Commission reaffirmed the mandate of the Working Group on ODR relating to cross-border electronic transactions, including B2B and B2C transactions.

2. At its twenty-second session (Vienna, 13-17 December 2010),<sup>4</sup> the Working Group commenced its consideration of the topic of ODR and requested that the Secretariat prepare draft generic procedural rules for ODR (the “Rules”), taking into account that the types of claims the Rules would address should be B2B and B2C, cross-border, low-value, high-volume transactions.<sup>5</sup> From its twenty-third (New York, 23-27 May 2011)<sup>6</sup> to twenty-eighth (Vienna, 18-22 November 2013)<sup>7</sup> sessions, the Working Group has considered the content of the Rules.

3. At its twenty-sixth session (Vienna, 5-9 November 2012), the Working Group identified that two tracks in the Rules might be required in order to accommodate jurisdictions in which agreements to arbitrate concluded prior to a dispute (“pre-dispute arbitration agreements”) are considered binding on consumers, as well as jurisdictions where pre-dispute arbitration agreements are not considered binding on consumers (A/CN.9/762, paras. 13-25, and annex).

<sup>1</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 257

<sup>2</sup> *Ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*.

<sup>3</sup> *Ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*.

<sup>4</sup> The report on the work of the Working Group at its twenty-second session is contained in document A/CN.9/716.

<sup>5</sup> A/CN.9/716, para. 115.

<sup>6</sup> The report on the work of the Working Group at its twenty-third session is contained in document A/CN.9/721.

<sup>7</sup> The report on the work of the Working Group at its twenty-eighth session is contained in document A/CN.9/795.

4. At its twenty-eighth session (Vienna, 18-22 November 2013), the Working Group proceeded to consider the draft text of the track of the Rules that did not end in a binding arbitration phase (“Track II”).<sup>8</sup>

## II. Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules

### A. General remarks

#### *Drafting matters*

5. The Working Group may wish to note that the order of the provisions of Track II of the Rules as contained in this note has been modified slightly from its previous iteration, in order to reflect better the flow of proceedings and to increase clarity in timelines as well as the commencement of different stages of proceedings.

6. The Working Group may wish to consider whether the definition, and use of the terms “communication” and “electronic communication” in the Rules, as set out in draft article 2(7), accurately capture the intended meaning of the provisions to which those terms are relevant — namely, that all communications in the course of ODR proceedings must be submitted electronically. In that respect, the Working Group may wish to consider whether there would ever be exceptional circumstances that would warrant reverting to paper or hard copy means of communication.

7. The terms, which were used interchangeably throughout the Rules, have been consolidated in option 1 of draft article 2(7) and the use of the term “communication” throughout the Rules has also been made consistent, and reflects the definition set out in that option.<sup>9</sup>

8. The Working Group may also wish to note that referring to a “transaction” and “agreements made at the time of transaction” in the preamble and in article 1 may create ambiguity as to the nature of the relationship between parties to a dispute. In that respect, the Working Group may wish to consider whether a contractual relationship will in practice exist, or ought as a matter of policy to exist, as between the parties to a dispute, and if so whether it is desirable to use terminology such as “contract” in the Rules to describe that relationship.

9. Finally, the Working Group requested that the term “electronic address” in articles 3 and 4 be reconsidered and more clearly phrased. In that respect, the Working Group may wish to have regard to the guidance set out at paragraph 185 of the explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts (the “Electronic Communications Convention”), in relation to that term: “... the term ‘electronic address’ ... appears in other international instruments such as the Uniform Customs and Practices for Documentary Credits (‘UCP 500’) Supplement for Electronic Presentation (‘eUCP’) ... Indeed, the term ‘electronic address’ may, depending on the technology used, refer to a communications network, and in other instances could include an electronic mailbox, a telecopy device or another specific ‘portion or location in an information system that a person uses for receiving electronic messages’”.

#### *ODR provider, ODR platform and ODR administrator*

10. The Working Group considered at its twenty-eighth session whether the Rules, which prescribed an ODR provider-led process by requiring all documents to go via an ODR provider (see, e.g., the definitions of those terms in draft article 2), accurately reflected the current practice of online dispute resolution, and the various possibilities for the process to be either provider-led or platform-led, or alternatively for the provider and the platform to

<sup>8</sup> A/CN.9/795, para. 21.

<sup>9</sup> The term “electronic communication” continues to be used in the preamble, and draft articles 1(1) and 2(1), because the term “communication” is only defined under option 1 in draft article 2(7).

be the same entity (A/CN.9/795, para. 51). The Working Group may wish to consider whether it is desirable for the Rules to refer to the relationship between the ODR provider and ODR platform (in the definitions section or otherwise), which, notwithstanding the current variety of practice, could further evolve with the development of the market, or whether a single term such as “ODR administrator” might allow for multiple modalities in terms of the relationship between an ODR platform and provider (see A/CN.9/795, paras. 48-56; see also A/CN.9/WG.III/WP.119, para. 22).

11. Having regard to that issue, the Working Group requested the Secretariat to prepare language that would define a single ODR entity for the purpose of the Rules (A/CN.9/795, para. 57). Such a definition has been inserted in draft article 2(3), as option 3.

12. At its twenty-eighth session, the Working Group further raised issues of liability in relation to the respective roles of ODR platform and provider, and specifically observed that it was important to be clear in the Rules which entity was responsible to whom, and for which part of the ODR proceedings (A/CN.9/795, para. 53). The Working Group may wish to consider whether it is the role of procedural rules to create obligations and clear lines of liability for the underlying entities, or whether the Rules ought rather to create a clear procedure directed toward end-users of the Rules.

13. Consequential amendments, including in articles 3, 4, 6, 7, 9, 10 and 12, would be required following any decision in that respect.

*“Final and binding”*

14. The Working Group considered at its twenty-eighth session whether Track II constituted a dispute resolution process with a “final and binding” outcome. (A/CN.9/795, paras. 75-80).

15. In that respect, the Working Group may wish to differentiate between: (i) the legal effect of an agreement to submit disputes to a Track II ODR proceeding; and (ii) the legal effect on the parties of a recommendation arising out of that proceeding.

(i) *Legal effect of an agreement to submit disputes to a Track II ODR proceeding*

16. In relation to the legal effect of an agreement to submit disputes to a Track II ODR proceeding, draft article 1 of the Rules provides for explicit agreement between the parties to submit disputes to ODR, and consequently for a clear (and binding) contractual basis for those proceedings. The Working Group may wish to consider whether Option II of article 4A, paragraph (3), undermines that agreement — essentially by requiring a one-sided “second click”, or a second agreement by the respondent, taking place post-dispute (see A/CN.9/WP119, paras. 8 and 12).

17. In addition, the Working Group may wish to consider whether the effect of entering into Track II ODR proceedings ought to prevent a party from seeking judicial or arbitral remedies while Track II ODR proceedings are underway (see draft article 4A, paragraph (4)(e), and its counterpart provision in draft article 4B). If so, the Working Group may wish to consider including an undertaking in the Rules to that effect (see UNCITRAL Conciliation Rules 1980, article 16).

18. In that respect, and for the avoidance of doubt, the Working Group may wish to consider whether a party ought to be able to withdraw from Track II ODR proceedings before a recommendation is issued, and if so, whether there ought to be a clear provision for a party to express its withdrawal from Track II ODR proceedings at any time during proceedings. The Working Group might wish to consider that a right to withdraw from Track II proceedings would accrue to both parties to a dispute, not just a claimant.

(ii) *Legal effect on the parties of a recommendation arising out of that proceeding*

19. In relation to the legal effect on the parties of a recommendation arising out of that proceeding, draft article 7(4) currently states that a recommendation is not binding on the parties unless they otherwise agree. The Working Group may wish to consider differentiating between the desirability of an outcome that has consequences (e.g. a chargeback implemented on the basis of a recommendation), and a “final and binding” outcome. A recommendation that is enforced via a “private enforcement mechanism” seeks

to encourage compliance with decisions, or to provide an execution mechanism for a decision, but may itself be subject to final enforcement in national courts (see A/CN.9/WG.III/WP.124, para. 5).

#### *Guidelines*

20. At its twenty-eighth session, the Working Group requested the Secretariat to draft preliminary guidelines that would indicate elements of the Rules better directed toward ODR providers and platforms than contained in procedural rules. Background and proposed content for those guidelines is contained in document A/CN.9/WG.III/WP.128, which may provide a useful reference point for assessing the Rules, and determining whether any content currently in the Rules might be better placed in those guidelines.

21. The Working Group may wish to note that the Rules provide a procedural framework for the resolution of disputes between purchasers and merchants. The neutral and ODR provider are part of that procedural framework, and consequently the rights and obligations of, and powers conferred on those entities as set out in the Rules, apply to those entities by virtue of their participation in the Rules-based process.

## **B. Notes on draft procedural rules**

22. The following preamble and articles 1-16 contained in this document and in document A/CN.9/WG.III/WP.127/Add.1 pertain only to Track II of the draft Rules.

### **1. Introductory rules**

#### **23. Draft preamble**

*“1. The UNCITRAL online dispute resolution rules (“the Rules”) are intended for use in the context of disputes arising out of cross-border, low-value transactions conducted by means of electronic communication.*

*“2. The Rules are intended for use in conjunction with an online dispute resolution framework that consists of the following documents [which are attached to the Rules as an Appendix]:*

*[“(a) Guidelines and minimum requirements for online dispute resolution providers/platforms/administrators;]*

*[“(b) Guidelines and minimum requirements for neutrals;]*

*[“(c) Substantive legal principles for resolving disputes;]*

*[“(d) Cross-border enforcement mechanism;]*

*[“...];”*

#### *Remarks*

##### *Paragraph (1)*

24. The term “high-volume” no longer appears in the preamble, following a decision of the Working Group at its twenty-eighth session to delete it (A/CN.9/795, para. 24; see also A/CN.9/WG.III/WP.123, para. 12).

25. The meaning and usage of the phrase “low-value”, both in relation to paragraph (1) of the preamble as well as in article 1(1), remains a matter for the further consideration of the Working Group (A/CN.9/795, paras. 25-27; 31-32). The Working Group considered at its twenty-fourth session that a definition for that phrase ought not to be included in the Rules, but indicative information set out in guidelines (A/CN.9/795, paras. 25-6; A/CN.9/739, para. 16). The Working Group may wish to have regard to document A/CN.9/WG.III/WP.128 in that respect.

26. The phrasing of paragraph (1) has also been slightly modified to reflect the fact that the Rules are intended for use in the context of “disputes arising out of” cross-border, low-value transactions.

*Paragraph (2)*

27. At its twenty-eighth session, the Working Group agreed to delete a paragraph in the preamble that referred to separate and supplemental rules or documents, on the basis that such a reference might be confusing (A/CN.9/795, para. 29).

28. Words indicating that the documents listed in paragraph (2) “form part of the Rules” have been deleted, as the legal nature, and addressees, of the Rules differ from those of the ancillary documents listed in paragraph (2). For the same reasons, and as set out in document A/CN.9/WG.III/WP.128, it might be advisable not to attach the documents currently listed in paragraph (2) of the preamble to the Rules as an Appendix.

29. **Draft article 1 (Scope of application)**

*“1. The Rules shall apply where the parties to a transaction conducted by use of electronic communication have explicitly agreed that disputes relating to that transaction and falling within the scope of the Rules shall be resolved under the Rules.*

*[“1 bis. Explicit agreement referred to in paragraph (1) above requires agreement separate from that transaction[, and] notice in plain language to the buyer that disputes relating to the transaction and falling within the scope of the Rules will be resolved through ODR proceedings under the Rules [and whether Track I or Track II of the Rules apply to that dispute] (the ‘dispute resolution clause’)].*

*“2. These Rules shall only apply to claims:*

*[“(a) that goods sold or services rendered were not delivered, not timely delivered, not properly charged or debited, and/or not provided in conformity with the agreement made at the time of the transaction; or*

*“(b) that full payment was not received for goods or services provided.]*

*“3. These Rules shall govern the ODR proceedings except that where any of these Rules is in conflict with a provision of applicable law from which the parties cannot derogate, that provision shall prevail.”*

*Remarks**General*

30. The Working Group may wish to consider whether to include a time period in article 1, in order to link the time for bringing an online claim to (i) a certain time after the goods or services have been paid for or delivered; or (ii) a certain time after the alleged breach.<sup>10</sup> In the alternative, guidelines might set out a suggested period in which claims could be brought in the online system.

31. Although procedural rules would typically not prescribe a limitation period, but would rather rely on national law to do so, the Working Group may wish to consider whether the Rules or guidelines should prescribe such a period in order to provide for procedural clarity for parties as well as ODR administrators. Such a period would not affect or override any period for bringing claims specified in national law.

*Paragraph (1)*

32. The Working Group may wish to consider whether the term “transaction conducted by use of electronic communications” is sufficiently clear, or whether clarifying further by replacing that phrase with “contract concluded or performed using electronic communications”, might be clearer (see para. 8 above).

*Paragraph (1)(bis)*

33. At its twenty-eighth session, the Working Group considered whether paragraph (1)(bis) might relate more appropriately to Track I proceedings, rather than to simplified Track II

<sup>10</sup> The United Nations Convention on the Limitation Period in the International Sale of Goods (1974), which does not apply to sales of goods for personal or household use, sets out principles for prescription periods based on the date on which the claim accrues (article 9).

proceedings (A/CN.9/795, para. 34). The Working Group may wish to consider whether a link exists between paragraph (1)(bis) and any declaration in relation to the pursuit of other remedies, under article 4(A), paragraph (4)(e) (see paras. 17-18 above).

*Paragraph (2)*

34. The Working Group agreed at its twenty-eighth session that the Rules ought to include an exhaustive list of the type of claims that may be brought (currently contained in paragraph (2)(a)) (see A/CN.9/795, para. 37). The words “or leased” in that list have been deleted on the basis that leasing claims might involve complex issues (for example, damage to leased goods) that are likely to fall outside the scope of the Rules.

35. The Working Group may wish to note that the term “in conformity with the agreement made at the time of transaction” in subparagraph (a) has been inserted in replacement of the term “in accordance with the agreement ...” to accord more closely with the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (“CISG”), and pursuant to the request of the Working Group to replace the phrase “in accordance with the agreement” (A/CN.9/795, para. 42).

36. Although the CISG does not apply to consumer contracts, the Working Group may wish to have regard to two additional elements of the CISG and their relationship to this provision. First, although the CISG does not use the term “timely delivery” (currently included in subparagraph (a)), the term “timely” is sometimes used to encompass the delivery requirements of article 33 of the CISG. Second, in relation to subparagraph (b), the Working Group may wish to note that the CISG gives the buyer two obligations under article 53: “The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.”<sup>11</sup> In other words, payment and taking delivery are treated independently (see articles 54-60 CISG). Moreover, article 31 CISG requires the seller to “hand over any documents relating to [the goods]”.

37. The Working Group may wish to consider whether a similar approach ought to be taken in relation to paragraph (2). In that respect, the Working Group may wish to consider amending paragraph (2)(a) as follows: “that goods sold or services rendered were not delivered, not timely delivered, not properly charged or debited, not provided in conformity with the agreement made at the time of transaction, and/or that documents related to the goods were not provided”; and amending paragraph (2)(b) as follows “that full payment was not received for goods or services provided and/or the purchaser did not take delivery of the goods”.

**38. Draft article 2 (Definitions)**

*“For purposes of these Rules:*

*ODR*

*“1. ‘ODR’ means online dispute resolution which is a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology.*

*Option 1:*

*“2. ‘ODR platform’ means an online dispute resolution platform which is a system for generating, sending, receiving, storing, exchanging or otherwise processing electronic communications used in ODR, and which is designated by the ODR provider in the ODR proceedings.*

*“3. ‘ODR provider’ means the online dispute resolution provider specified in the dispute resolution clause. An ODR provider is an entity that administers ODR proceedings [and designates an ODR platform][, whether or not it maintains an ODR platform].*

<sup>11</sup> See, e.g., UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2012 Edition, Article 33, paras. 6, 8, 9, available from [www.uncitral.org/uncitral/en/case\\_law/digests.html](http://www.uncitral.org/uncitral/en/case_law/digests.html).

*Option 2:*

“2. ‘ODR platform’ means the entity specified in the dispute resolution clause that supplies a system for generating, sending, receiving, storing, exchanging or otherwise processing electronic communications used in ODR.

“3. ‘ODR provider’ means the entity that administers ODR proceedings agreed upon by the parties; and should be specified in the dispute resolution clause if the specific ODR provider is known at the time of transaction.

*Option 3:*

“2. ‘ODR administrator’ means the entity specified in the dispute resolution clause that administers and coordinates ODR proceedings.

*Parties*

“4. ‘Claimant’ means any party initiating ODR proceedings under the Rules by issuing a notice.

“5. ‘Respondent’ means any party to whom the notice is directed.

*Neutral*

“6. ‘Neutral’ means an individual that assists the parties in settling or resolving the dispute.

*Communication**Option 1*

“7. ‘Communication’ for the purposes of these Rules means any communication (including a statement, declaration, demand, notice, response, submission, notification or request) made by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means.

*Option 2*

“7. ‘Communication’ means any statement, declaration, demand, notice, response, submission, notification or request made by any person to whom the Rules apply in connection with ODR.

“8. ‘Electronic communication’ means any communication made by any person to whom the Rules apply by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means [including, but not limited to, electronic data interchange (EDI), electronic mail, telecopy, short message services (SMS), web-conferences, online chats, Internet forums, or microblogging] and includes any information in analogue form such as document objects, images, texts and sounds that are converted or transformed into an electronic format so as to be directly processed by a computer or other electronic devices.”

*Remarks**Paragraphs (2) and (3)*

39. Three options have been included for the consideration of the Working Group, following agreement at its twenty-eighth session to consider further the role of ODR providers and platforms in practice, as well as the need for the Rules to distinguish between the roles of those two entities (see paras. 10-13 above).

*Options 1 and 2*

40. Options 1 and 2 define “ODR provider” and “ODR platform” separately, with the first option indicating that most systems will be provider-led, insofar as platforms would be designated by providers; the second option provides more neutral language in respect of the inter-relationship between platform and provider. The phrase “dispute resolution clause referring disputes to online dispute resolution under these Rules” has been replaced by “dispute resolution clause” in option 1, to retain consistency with the other options in relation to paragraphs (2) and (3).



41. The Working Group may wish to consider whether the Rules ought to distinguish between the roles of platform and provider: in short, whether such a designation is useful for the functioning of the Rules. If so, the Working Group may wish to consider whether options 1 or 2 adequately reflect the nature of the existing ODR systems and also provide for a potential evolution of ODR practice. If not, the Working Group may wish to consider whether option 3 provides a more streamlined approach that reduces the need to consider the mechanics of the underlying system within the Rules themselves.

*Option 3*

42. A third option has been included to define an “ODR administrator” — a single entity that would maintain full party-facing contact and responsibility for the administration of a dispute (see A/CN.9/795, paras. 56-57, and paras. 10-13 above). The definition indicates that that entity would “administer and coordinate” ODR proceedings, in order to account for the fact that such an entity might be a provider, platform, or both, but that for the purposes of the Rules, that entity would be the administrator of all services provided to the parties.

*Specifying relevant entity in dispute resolution clause*

43. The specification of the ODR provider, platform or administrator in the dispute resolution clause is also provided for (in square brackets) in draft article 9. The Working Group may wish to consider the value of identifying one or all of these entities at the time of the dispute resolution clause, and/or the time of the dispute arising, and when the different entities will be appointed. In that respect the Working Group may wish to consider whether, if an ODR platform identifies an ODR provider after the dispute has arisen, that would be problematic for the purposes of transparency, and moreover whether the identification of the ODR platform in the dispute resolution clause would be useful to the disputing parties.

*Paragraphs (7) and (8)*

*Option 1*

44. The Working Group may wish to consider whether the terms “communication” and “electronic communication” could be consolidated, as set out in option 1, and further discussed at paras. 6-7 above. The definition contained in option 1 captures the need to ensure that (i) “communication” is defined as broadly as possible to capture any form of communication that may take place under the Rules; and (ii) all communication under the Rules is electronic in form. The definition in option 1 also conforms with the definitions of communication and electronic communication in the Electronic Communications Convention.

*Option 2*

45. The definitions in option 2 as set out in paragraphs (7) and (8) derive from article 4 of the Electronic Communications Convention, but the Working Group may wish to consider whether those definitions adequately serve the intention of the Rules that all communications in the course of proceedings are made electronically via the platform. The phrase “electronic format” has been substituted for “digital format” in paragraph (8) in order to provide as technology-neutral a definition as possible. Should the Working Group decide to retain the wording in option 2, it may wish to consider whether it is necessary to include the phrase “so as to be directly processed by a computer or other electronic devices” in paragraph (8).

**46. Draft article 3 (Communications)**

*“1. All communications in the course of ODR proceedings shall be communicated to the [ODR provider via the ODR platform designated by the ODR provider]/[ODR administrator]. [The electronic address of the ODR platform/administrator to which documents must be submitted shall be specified in the dispute resolution clause.]*

*“2. The designated electronic address of the claimant for the purpose of all communications arising under the Rules shall be that notified by the claimant to the ODR provider under paragraph (2) and as updated to the ODR provider at any time*

*thereafter during the ODR proceedings (including by specifying an updated electronic address in the notice, if applicable).*

*“3. The electronic address for communication of the notice by the ODR provider to the respondent shall be that notified by the respondent to the ODR provider under paragraph (2) and as updated to the claimant or ODR provider at any time prior to the issuance of the notice. Thereafter, the respondent may update its electronic address by notifying the ODR provider at any time during the ODR proceedings.*

*“4. A communication shall be deemed to have been received when, following submission to the ODR provider in accordance with paragraph (1), the ODR provider notifies the parties of the availability thereof in accordance with paragraph (6). The neutral may in his or her discretion extend any deadline in the event the addressee of any communication shows good cause for failure to retrieve that communication from the platform.*

*“5. The ODR provider shall promptly communicate acknowledgements of receipt of electronic communications between the parties and the neutral to all parties [and the neutral] at their designated electronic address.*

*“6. The ODR provider shall promptly notify all parties and the neutral of the availability of any communication at the ODR platform.*

*“7. The ODR provider shall promptly notify all parties and the neutral of the conclusion of the negotiation stage of proceedings and the commencement of the facilitated settlement stage of proceedings; the expiry of the facilitated settlement stage of proceedings; and, if relevant, the commencement of the recommendation stage of proceedings.”*

#### *Remarks*

##### *General*

47. The Working Group may wish to note that the phrase “ODR administrator” has been added by way of alternative to paragraph (1) for illustrative purposes, but that remaining consequential changes throughout the draft would necessarily have to be made should the Working Group determine that that definition (option 3, article 2, paragraphs (2)-(3)) ought to replace separate definitions of ODR providers and ODR platforms.

48. The Working Group may wish to note that the words “may be submitted” in the second sentence of paragraph (1) have been replaced with “must be submitted” to clarify the need for all information to be submitted electronically via the ODR platform or administrator.

49. The Working Group may wish to note that paragraph (2), which provided that “[a]s a condition to using the Rules each party must, [at the time it provides its explicit agreement to submit the disputes relating to the transaction to ODR under the Rules, also] provide its electronic contact information”, has been deleted on the basis that it created inconsistency in practice with other provisions in draft article 3.

##### *Electronic address*

50. In relation to the use of the term “electronic address” and/or “designated electronic address”, the Working Group agreed to consider the definition and meaning of that term in relation to its use in draft articles 3 and 4. The Working Group may wish to consider whether the explanation set out in paragraph 9 above provides further clarity, or whether a definition of the term “electronic address” might be useful.

##### *Paragraph (4)*

51. The Working Group may wish to consider whether the second sentence of paragraph (4) would be better placed in draft article 11, in particular in light of article 11(5).

## 2. Commencement

### 52. Draft article 4A (Notice)

*“1. The claimant shall communicate to the ODR provider a notice in accordance with the form contained in paragraph (4).*

*“2. [The notice shall be promptly communicated by the ODR provider to the respondent.][The ODR provider shall promptly notify the respondent that the notice is available at the ODR platform.]*

*Option 1:*

*[“3. ODR proceedings shall [be deemed to] commence when, following communication to the ODR provider of the notice pursuant to paragraph (1), the ODR provider notifies the parties of the availability thereof in accordance with paragraph (2).]*

*Option 2:*

*[“3. ODR proceedings shall commence when the respondent submits a response pursuant to article 4B accepting the [mediation/conciliation].]*

*“4. The notice shall include:*

*“(a) the name and [designated electronic address] of the claimant and of the claimant’s representative (if any) authorized to act for the claimant in the ODR proceedings;*

*“(b) the name and designated electronic address of the respondent and of the respondent’s representative (if any) known to the claimant;*

*“(c) the grounds on which the claim is made;*

*“(d) any solutions proposed to resolve the dispute;*

*[“(e) a statement that the claimant is not currently pursuing other remedies against the respondent with regard to the specific dispute in relation to the transaction in issue;]*

*“(f) the location of the claimant;*

*“(g) the claimant’s preferred language of proceedings;*

*“(h) the signature of the claimant [and/or the claimant’s representative] including any other identification and authentication methods.*

*[“5. The claimant may provide, at the time it submits its notice, any other relevant information, including information in support of its claim.]”*

#### Remarks

##### Paragraph (3)

53. At its twenty-eighth session the Working Group agreed on the need for a provision setting out a clear commencement stage of proceedings, and an additional option was proposed in order to trigger the commencement of proceedings at the time a response was submitted (option 2).

54. The Working Group may wish to consider, in relation to option 2, whether requiring a respondent to lodge a response before proceedings can commence, in practice gives the respondent the right to refuse to enter into ODR proceedings notwithstanding that it had agreed to do so contractually at a previous stage (pursuant to article 1(1)) (see also para. 16 above). In relation to option 2, the Working Group might also wish to consider whether describing Track II proceedings as a “mediation” or “conciliation” accurately describes the multi-stage process encompassed by that track.

55. In relation to option 1, the Working Group may wish to consider whether the square bracketed language “to be deemed” is necessary in light of the requirement of paragraph (3) for parties to be notified, in conjunction with the power of the neutral under article 11(5) to redress any difficulties in relation to receipt of notice (see A/CN.9/795, para. 72).

*Paragraph (4)**Subparagraph (a)*

56. In relation to subparagraph (a), the Working Group agreed to consider the definition and meaning of “electronic address” both in relation to that subparagraph as well as in relation to draft article 3 (see paras. 9 and 50 above).

57. The Working Group may wish to consider whether representation of parties is appropriate in Track II proceedings (see also draft article 14, and para. 19 of document A/CN.9/WG.III/WP.127/Add.1).

*Subparagraph (e)*

58. In relation to subparagraph (e), and as further set out in paragraphs 17 and 33 above, the Working Group ought to consider whether Track II proceedings require a stay of other action while those proceedings are underway, and moreover, whether a court or arbitral tribunal would be obliged under its own national legislation to implement such a stay. If the ODR proceedings in Track II are not intended to have a *res judicata* effect, then it is proposed to delete subparagraph (e); if such an effect is intended, the Working Group might wish to consider inserting an undertaking such as that set out in article 16 of the UNCITRAL Conciliation Rules 1980 (see para. 17 above).

*Subparagraph (f)*

59. In relation to subparagraph (f), it is suggested that the “location” of the claimant is a confusing term and moreover that it does not in any event have relevance for a Track II proceeding (see A/CN.9/795, para. 84, and A/CN.9/739, paras. 78-80).

*Subparagraph (h)*

60. In relation to subparagraph (h), the term “signature ... in electronic form” has been replaced by “signature”, consistent with UNCITRAL texts on e-commerce<sup>12</sup> that provide a functional equivalence rule for signatures.

61. It is moreover proposed that the Working Group further consider the function performed by the claimant’s signature requirement. In that respect, it should be noted that a signature may perform multiple functions, and that, in order to establish functional equivalence between electronic signatures and paper-based ones, the electronic signature needs to satisfy two requirements, namely to identify the author, and to ascertain the intention of the author with respect to the signed communication (see article 9(3), Electronic Communications Convention). The Working Group may therefore wish to clarify whether in this case the function of the (electronic) signature is to identify the claimant and to establish a link between the claimant and the claim.

62. At its twenty-eighth session, the Working Group agreed to retain the language “including any other identification and authentication methods” in subparagraph (h) (A/CN.9/795, para. 86). However, it is suggested that that language ought to be deleted in light of the clarifications provided on the signature requirement. Moreover, the current text might be interpreted as restricting electronic signature methods to certain authentication methods such as, for example, the log-in of the parties to the ODR platform.

*Paragraph (5)*

63. The Working Group agreed at its twenty-eighth session that it was desirable to encourage claimants to submit all relevant information to the extent possible at the time of the notice, but that the provision of such information ought not to be mandatory (A/CN.9/795, para. 92). Consequently, a new paragraph (5) has been inserted to provide for the (non-mandatory) provision of information by the claimant at the time it submits its notice. The following text has been deleted from paragraph (1), to avoid redundancy: “The notice

<sup>12</sup> See Article 7 of the UNCITRAL Model Law on Electronic Commerce (1996); Article 6 of the UNCITRAL Model Law on Electronic Signatures (2001); and article 9(3) of the Electronic Communications Convention.

should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.”

64. Parallel amendments have been included in draft article 4B, paragraphs (1) and (5).

**65. Draft article 4B (Response)**

*“1. The respondent shall communicate to the ODR provider a response to the notice in accordance with the form contained in paragraph (3) within [seven (7)] calendar days of being notified of the availability of the notice on the ODR platform.*

*“2. The response shall include:*

*“(a) the name and designated electronic address of the respondent and the respondent’s representative (if any) authorized to act for the respondent in the ODR proceedings;*

*“(b) a response to the grounds on which the claim is made;*

*“(c) any solutions proposed to resolve the dispute;*

*[“(d) a statement that the respondent is not currently pursuing other remedies against the claimant with regard to the specific dispute in relation to the transaction in issue;]*

*“(e) the location of the respondent;*

*[“(f) whether the respondent agrees with the language of proceedings provided by the claimant pursuant to article 4A, paragraph 4(g) above, or whether another language of proceedings is preferred;]*

*[“(g) the signature of the respondent and/or the respondent’s representative including any other identification and authentication methods].*

*“5. The respondent may provide, at the time it submits its notice, any other relevant information, including information in support of its response.]”*

*Remarks*

*Paragraph (1)*

66. The Working Group may wish to note that paragraph (1) will require amendment to maintain consistency with the content, when determined, of article 4A, paragraphs (1)-(3); until that content has been finally determined, the phrase “receipt of the notice” has been replaced by “being notified of the availability of the notice on the ODR platform” in order to improve drafting consistency.

**67. Draft article 4C (Counterclaim)**

*“[1. The response to an ODR notice may include one or more counterclaims provided that such counterclaims fall within the scope of the Rules and arise out of the same transaction as the claimant’s claim. A counterclaim shall include the information in article 4A, paragraphs (4)(c) and (d).*

*“2. The claimant may respond to any counterclaim within [seven (7)] calendar days of being notified of the existence of the response and counterclaim on the ODR platform. A response to the counterclaim must include the information in article 4, paragraphs (4)(b) and (c).]”*

*Remarks*

68. Further to the decision of the Working Group at its twenty-eighth session that a separate provision ought to be included in relation to counterclaims and responses thereto, a new draft article 4C has been included.

69. The Working Group may wish to note that deadlines flowing from the notification of the response will also have to accommodate the possibility of a counterclaim and response thereto as an alternative reference time from which the next stage of proceedings will be triggered.

### 3. Negotiation

#### 70. Draft article 5 (Negotiation)

##### *Negotiation*

##### *Commencement of the negotiation stage*

“1. If the response does not include a counterclaim, the negotiation stage shall commence upon communication of the response to the ODR provider, and notification thereof to the claimant. If the response does include a counterclaim, the negotiation stage shall commence upon communication of the response by the claimant to that counterclaim and notification thereof to the respondent, or after the expiration of the response period set out in article 4C, paragraph (2), whichever is earlier.

“2. The negotiation stage of proceedings shall comprise negotiation between the parties via the ODR platform.

##### *Commencement of the facilitated settlement stage*

“3. If the respondent does not communicate to the ODR provider a response to the notice in accordance with the form contained in article 4B, paragraph (3) within the time period set out in article 4B, paragraph (1), or where one or both parties request that the process move to the facilitated settlement stage of proceedings, or a party elects not to engage in the negotiation stage of proceedings, then the facilitated settlement stage of ODR proceedings shall immediately commence.

“4. If the parties have not settled their dispute by negotiation within ten (10) calendar days of the commencement of the negotiation stage of proceedings, the facilitated settlement stage of ODR proceedings shall immediately commence.

##### *Extension of time*

“5. The parties may agree to a one-time extension of the deadline for reaching settlement. However no such extension shall be for more than ten (10) calendar days.”

##### *Remarks*

71. The Working Group may wish to note that a paragraph in relation to settlement has been moved to a separate article — draft article 8 — to reflect the agreement of the Working Group on the principle that settlement could be achieved not only at a negotiation stage, but at any stage of proceedings (A/CN.9/795, para. 122).

##### *Paragraphs (1) and (2)*

72. Paragraph (1) has been slightly modified to accommodate deadlines flowing from both a response stage, and, if applicable, a counterclaim stage.

73. Paragraph (1) has been slightly modified, and a new paragraph (2) added, to reflect more clearly the commencement of negotiation, and the content of that stage. The phrase “including, where appropriate, the communication methods available on the ODR platform” in paragraph (1) has been replaced by “... via the ODR platform”, to clarify that all negotiation within the context of Track II proceedings ought to take place via the ODR platform. While it might be desirable as a matter of policy for the parties to communicate outside that platform should that communication achieve a settlement, any communication outside the platform would fall outside of the relevant ODR Track II proceeding.

##### *Paragraphs (3) and (4)*

74. Paragraphs (3) and (4) have been slightly modified in order more clearly to define the consequences of failing to submit a response; or agreeing or electing to move to the next stage of proceedings (facilitated settlement).

75. The draft set out in paragraph 70 above links the end of a negotiation stage with the beginning of a facilitated settlement stage, whereas previously it had been linked to the appointment of a neutral, but not to the next stage of proceedings.

76. Consequent to that modification, draft article 6 in relation to facilitated settlement has been modified to link the commencement of the facilitated settlement stage with the appointment of a neutral. It is suggested that such a chronology more clearly sets out the various stages of the process and the actions associated with each stage of proceedings. The Working Group may wish to consider whether paragraphs (3) and (4) would be better situated at the beginning of draft article 6.

#### 4. Facilitated settlement

##### 77. Draft article 6 (Facilitated settlement)

*“1. Upon commencement of the facilitated settlement stage of ODR proceedings, the [ODR provider/platform/administrator] shall promptly appoint a neutral in accordance with article 9 and shall notify the parties thereof in accordance with article 9(1).*

*“2. Following appointment, the neutral shall communicate with the parties to attempt to reach a settlement agreement.*

*“3. If the parties have not settled their dispute by facilitated settlement within ten (10) calendar days of being notified of the appointment of the neutral pursuant to article 9(1) (the ‘expiry of the facilitated settlement stage’), the final stage of proceedings shall commence pursuant to article 7 (Recommendation by a neutral).”*

##### Remarks

##### Paragraph (1)

78. Paragraph (1) has been included in order to clarify the process following commencement of the facilitated settlement stage (see also paras. 74-76 above).

##### Paragraph (2)

79. Further to the agreement of the Working Group that settlement provisions ought to be the subject of a discrete article applicable to any stage of proceedings (see para. 71 above, and A/CN.9795. paras. 121-122), the following sentence has been deleted from paragraph (2) as redundant with new draft article 8: “If the parties reach a settlement agreement, then such settlement agreement shall be recorded on the ODR platform, at which point, the ODR proceedings will automatically terminate.”

80. The words “Following appointment” have been inserted at the beginning of paragraph (2) in order to improve clarity.

##### Paragraph (3)

81. Paragraph (3) has been slightly modified to ensure consistency with the modifications made to draft article 5 in relation to the commencement of the next stage of proceedings.

#### 5. Recommendation

##### 82. Draft article 7 (Recommendation by a neutral)

*“1. At the expiry of the facilitated settlement stage, the neutral shall proceed to communicate a date to the parties for any final communications to be made. Such date shall be not later than ten (10) calendar days from the expiry of the facilitated settlement stage.*

*“2. Each party shall have the burden of proving the facts relied on to support its claim or defence. The neutral shall have the discretion to reverse such burden of proof where, in exceptional circumstances, the facts so require.*

*“3. The neutral shall, within fifteen (15) calendar days of the expiry of the facilitated settlement stage, evaluate the dispute based on the information submitted by the parties, and having regard to the terms of the agreement, and shall make a recommendation in relation to the resolution of the dispute. The ODR provider shall communicate that recommendation to the parties and the recommendation shall be recorded on the ODR platform.*

*“4. The recommendation shall not be binding on the parties unless they otherwise agree. [However, the parties are encouraged to abide by the recommendation and the ODR provider may introduce the use of trustmarks or other methods to identify compliance with recommendations.]”*

#### Remarks

##### Paragraph (1)

83. The Working Group may wish to note that some slight drafting modifications have been made to paragraph (1) to promote clarity of drafting and consistency with other provisions in the Rules.

##### Paragraph (2)

84. The Working Group may wish to consider whether paragraph (2) is necessary or appropriate in the context of Track II proceedings. It is suggested that “burden of proof” is a legal concept that touches upon both procedural and substantive matters depending on the context and the jurisdiction, and that including a provision on burden of proof in procedural rules the outcome of which is a non-binding determination by a neutral may unnecessarily increase the complexity of proceedings.

##### Paragraph (3)

85. Several minor modifications have been made in relation to the drafting of paragraph (3), specifically: (i) a deadline has been inserted for the rendering of a “recommendation”; (ii) the phrase “on the terms of the contract” has been replaced with “having regard to the terms of the agreement”, in accordance with the way that term is described in the preamble and in article 1; and (iii) the words “in relation to the resolution of the dispute” have been added after the word “recommendation”, in order to clarify the object and purpose of the recommendation.

86. The deadline now referred to in paragraph (3) is linked to the deadline in paragraph (1), in order to give the neutral a minimum of five days after the submission of any final information by the parties to render a decision. The Working Group may wish to consider whether the deadlines in paragraphs (1) and (3) are suitable.

##### Paragraph (4)

87. It is proposed that paragraph (4) could be better placed in commentary or guidelines. In that respect, language has been inserted in document A/CN.9/WG.III/WP.128.

## 6. Settlement

### 88. Draft article 8 (Settlement)

*“If settlement is reached at any stage of the ODR proceedings, the terms of such settlement shall be recorded on the ODR platform, at which point, the ODR proceedings will automatically terminate.”*

#### Remarks

##### General

89. Pursuant to the decision of the Working Group that settlement ought to be provided for at any time during ODR proceedings, a discrete provision on settlement has been included in draft article 8 (A/CN.9/795, para. 121-122; see also para. 71 above).

90. The Working Group may wish to consider whether guidelines ought to provide further information in respect of how a settlement ought to be recorded, and whether that process ought to be different prior to the appointment of a neutral, and after the appointment of a neutral (see A/CN.9/795, para. 120).



91. The Working Group may further wish to consider any technical aspects regarding formation of settlement agreements, including whether a separate provision on disputes arising out of the settlement might be required in this respect (see A/CN.9/WG.III/WP.119/Add.1, para. 13).

## (A/CN.9/WG.III/WP.127/add.1) (Original: English)

**Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules**

## ADDENDUM

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**II. Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules****B. Notes on draft procedural rules****8. Neutral****1. Draft article 9 (Appointment of neutral)**

“1. The ODR [provider/platform/administrator] shall appoint the neutral promptly following commencement of the facilitated settlement stage of proceedings. Upon appointment of the neutral, the ODR provider shall promptly notify the parties of the name of the neutral and any other relevant or identifying information in relation to that neutral.

“2. The neutral, by accepting appointment, confirms that he or she can devote the time necessary to conduct the ODR proceedings diligently, efficiently and in accordance with the time limits in the Rules.

“3. The neutral shall, at the time of accepting his or her appointment, declare his or her impartiality and independence. The neutral, from the time of his or her appointment and throughout the ODR proceedings, shall without delay disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence to the ODR provider. The ODR provider shall promptly communicate such information to the parties.

*Objections to the appointment of a neutral*

“4. Either party may object to the neutral’s appointment within [two (2)] calendar days (i) of the notification of appointment without giving reasons therefor; or (ii) of a fact or matter coming to its attention that is likely to give rise to justifiable doubts as to the impartiality or independence of the neutral, setting out the fact or matter giving rise to such doubts, at any time during the ODR proceedings.

“5. Where a party objects to the appointment of a neutral under paragraph (4)(i), that neutral shall be automatically disqualified and another appointed in his or her place by the ODR provider. Each party shall have a maximum of [three (3)] challenges to the appointment of a neutral following each notice of appointment, following which the appointment of a neutral by the ODR provider will be final, subject to paragraph (4)(ii). Alternatively if no challenges are made within two (2) days of any notice of appointment, the appointment will become final, subject to (4)(ii).

“6. Where a party objects to the appointment of a neutral under paragraph (4)(ii), the ODR provider shall make a determination within [three (3)] calendar days, regarding whether that neutral shall be replaced.

“7. In the event both parties object to the appointment of a neutral under paragraph (4)(i) or (4)(ii), that neutral shall be automatically disqualified and another appointed in his or her place by the ODR provider, notwithstanding the number of challenges that has been made by either party.

*Objections to provision of information*

“8. Either party may object, within three (3) calendar days of the final appointment of the neutral, to the provision by the ODR provider to the neutral of information generated during the negotiation stage. Following the expiration of this three-day period and in the absence of any objections, the ODR provider shall convey the full set of existing information on the ODR platform to the neutral.

*Number of neutrals*

“9. The number of neutrals shall be one.”

*Remarks*

*Paragraph (1)*

2. Further to the agreement of the Working Group at its twenty-eighth session that some basic information in relation to a neutral ought to be provided to the parties, but that the provision of that information ought not unduly to burden the ODR provider (A/CN.9/795, para. 128), language providing for additional identifying information in respect of a neutral has been included in paragraph (1) for the consideration of the Working Group.
3. The following sentence has been inserted at the beginning of paragraph (1) to improve clarity of drafting and to reflect draft article 7(1): “*The ODR provider shall appoint the neutral promptly following commencement of the facilitated settlement stage of proceedings.*”
4. The Working Group may wish to note that the terms “ODR platform” and “ODR administrator” have been added by way of alternative to paragraph (1) for illustrative purposes, but that remaining consequential changes in draft article 9 would necessarily have to be made subject to the determination of the Working Group in relation to draft article 2, paragraphs (2)-(3).

*Paragraph (2)*

5. Paragraph (2) has been modified to reflect the discussions of the Working Group at its twenty-eighth session, and mirrors the language in the second model statement to article 11 set out in the Annex to the UNCITRAL Arbitration Rules 2010 (A/CN.9/795, paras. 130-132).

*Paragraph (6)*

6. The residual discretion left to an ODR provider under paragraph (6) may require further guidance, either in guidelines or in the Rules themselves. In that respect, language has been inserted in document A/CN.9/WG.III/WP.128.

*Paragraph (7)*

7. Paragraph (7) reflects the agreement of the Working Group at its twenty-eighth session to reflect in article 9 the principle that where both parties object to the appointment of a neutral, that neutral ought to be replaced without any decision-making on behalf of the provider (A/CN.9/795, para. 136).
8. **[Draft article 10 (Resignation or replacement of neutral)]**

*“If the neutral resigns or otherwise has to be replaced during the course of ODR proceedings, the ODR provider through the ODR platform shall appoint a neutral to replace him or her pursuant to article 9. The ODR proceedings shall resume at the stage where the neutral that was replaced ceased to perform his or her functions.]”*

9. **Draft article 11 (Power of the neutral)**

*“1. Subject to the Rules, the neutral may conduct the ODR proceedings in such manner as he or she considers appropriate.*

*“1 bis. The neutral, in exercising his or her functions under the Rules, shall conduct the ODR proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the dispute. In doing so, the neutral shall remain at all times wholly independent and impartial and shall treat both parties equally.*

*“2. Subject to any objections under article 9, paragraph (8), the neutral shall conduct the ODR proceedings on the basis of all communications made during the ODR proceedings.*

*“3. At any time during the proceedings the neutral may request or allow the parties (upon such terms as to costs and otherwise as the neutral shall determine) to provide additional information, produce documents, exhibits or other evidence within such period of time as the neutral shall determine.*

*[“4. The neutral shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence or validity of any agreement to refer the dispute to ODR. For that purpose, the dispute resolution clause shall be treated as an agreement independent of the other terms of the agreement. A determination by the neutral that the contract is null shall not automatically entail the invalidity of the dispute resolution clause.]*

*“5. Where it appears to the neutral that there is any doubt as to whether the respondent has received the notice under the Rules, the neutral shall make such inquiries or take such steps as he or she deems necessary to satisfy himself or herself with regard to such receipt, and in doing so may where necessary extend any time period provided for in the Rules. [As to whether any party has received any other communication in the course of the ODR proceedings, the neutral may make such inquiries or take such steps as he or she deems necessary to satisfy himself or herself with regard to such receipt, and in doing so, may, where necessary, extend any time period provided for in the Rules.]”*

*Remarks*

*Paragraph (1)*

10. The square bracketed “[and the Guidelines and Minimum Requirements for ODR Neutrals]” following the words “subject to the Rules” has been deleted, on the basis that the legal nature and addressees of the Rules and of supplementary guidelines differ, and the former ought not to be incorporated by reference into the latter (see A/CN.9/WG.III/WP.127, para. 28, and A/CN.9/WG.III/WP.128).

*Paragraph (2)*

11. The Working Group may wish to note that some slight drafting modifications have been made to paragraph (2) to maintain consistency with other provisions in the Rules.

*Paragraph (4)*

12. The language in paragraph (4) has been slightly modified to improve clarity, including the substitution of the word “agreement” for “contract” in the second sentence, in accordance with the way that term is set out in the preamble and paragraph (1).

13. The Working Group may wish to consider whether a traditional competence-competence and severability provision is necessary or appropriate in the context of Track II proceedings.

14. In any event, as identified by the Working Group at its twenty-eighth session, the requirement in draft article 1, paragraph (1)(bis), for the parties to agree to ODR proceedings in an agreement separate from the transaction, is potentially confusing when read alongside paragraph (4) (A/CN.9/795, para. 145).

## 9. General provisions

### 15. Draft article 12 (ODR provider)

*“[The ODR provider/platform/administrator shall be specified in the dispute resolution clause.]”*

#### Remarks

16. The Working Group may wish to consider, in relation to draft article 12: (i) if an entity administering the dispute ought to be specified in the dispute resolution clause; (ii) if so, which of the entities involved in administering the dispute (provider/platform/administrator) ought that to be; and (iii) whether the Rules ought to mandate such specification, or whether the requirement to specify might better be placed in guidelines.

### 17. Draft article 13 (Language of proceedings)

*“[1. Subject to an agreement by the parties, the neutral shall, promptly after its appointment, determine the language or languages to be used in the proceedings[, having regard to the parties’ due process rights under article [x]].*

*“2. All communications, with the exception of any communications falling under paragraph (3) below, shall be submitted in the language of the proceedings (as agreed or determined in accordance with this article), and where there is more than one language of proceedings, in one of those languages.*

*“3. Any documents attached to the communications and any supplementary documents or exhibits submitted in the course of the ODR proceedings may be submitted in their original language, provided that their content is undisputed.*

*“4. When a claim relies on a document or exhibit whose content is disputed, the neutral may order the party serving the document or exhibit to provide a translation of that document into [a language which the other party understands] [the other language of the proceedings] [failing which, the language the other party included in its notice or response as its preferred language].”*

### 18. Draft article 14 (Representation)

*“A party may be represented or assisted by a person or persons chosen by that party. The names and designated electronic addresses of such persons [and the authority to act] must be communicated to the other party by the ODR provider.”*

#### Remarks

19. The Working Group may wish to consider whether representation is necessary or appropriate in Track II proceedings.

### 20. Draft article 15 (Exclusion of liability)

*“[Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the ODR provider and neutral based on any act or omission in connection with the ODR proceedings under the Rules.]”*

### 21. Draft article 16 (Costs)

*“[The neutral shall make no [decision] [award] as to costs and each party shall bear its own costs.]”*

#### Remarks

22. The Working Group may wish to consider whether a costs provision is necessary or appropriate in Track II proceedings.

## G. Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft guidelines

(A/CN.9/WG.III/WP.128)

[Original: English]

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## I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission established a Working Group to undertake work in the field of online dispute resolution (ODR) and agreed that the form of the legal standard to be prepared should be decided after further discussion of the topic.<sup>1</sup>

2. At its twenty-second session (Vienna, 13-17 December 2010), Working Group III commenced its consideration of the topic of ODR and requested that the Secretariat prepare (inter alia) draft generic procedural rules for ODR in respect of business-to-business, and business-to-consumer disputes arising out of cross-border, low-value, high-volume transactions (A/CN.9/716, para. 115). At that session, the Working Group requested that the scope of application of the Rules clarify that the Rules were intended to be used as part of an ODR framework, consisting (inter alia) of one document setting out “guidelines for ODR providers and arbitrators”, and another “minimum requirements for ODR providers and arbitrators, including common communication standards and formats and also including accreditation and quality control” (A/CN.9/721, paras. 52 and 140).

3. Notwithstanding various amendments to the title of those documents, the preamble of the Rules as contained in documents A/CN.9/WG.III/WP.123 (Track I), and A/CN.9/WG.III/WP.127 (Track II) refers to a dispute resolution framework that consists of (inter alia) the following documents: “guidelines and minimum requirements for online dispute resolution providers/platforms/administrators”; and “guidelines and minimum requirements for neutrals”.

4. At its twenty-eighth session, the Working Group mandated the Secretariat to prepare draft guidelines for the various actors involved in facilitating or undertaking the Rules (A/CN.9/795, para. 57). This note consequently aims to provide an outline of the guidance that might be practicable, bearing in mind the types of documents listed in the preamble of the Rules as contained in documents A/CN.9/WG.III/WP.123 (Track I), and A/CN.9/WG.III/WP.127 (Track II). Such outline does not address the form such guidance may take, and in particular whether it would best take the form of general principles (see, for example, the Proposal of the Canadian delegation on principles applicable to online dispute resolution providers and neutrals, set out in document A/CN.9/WG.III/WP.114), or whether it ought to provide more detailed guidance as to how to achieve those principles.

5. Furthermore, this note does not set out “minimum requirements” for the relevant entities in the ODR process (see Preamble, Track II, document A/CN.9/WG.III/WP.127). The Working Group may wish to consider whether such requirements ought to be specified in guidelines, or whether principles set out in guidelines can be implemented according to ODR providers’ own requirements.

6. As set out in further detail below, preliminary questions that the Working Group might wish to consider include: (i) the purpose of the guidelines; (ii) the relationship of the

<sup>1</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 257.

guidelines with the Rules; (iii) the intended stakeholders to which the guidelines are addressed; and (iv) the format the guidelines ought to take.

## II. Draft content of guidelines for ODR providers/platforms/administrators

### A. General

#### *Purpose of guidelines and relationship with the Rules*

7. The Working Group may wish to consider (i) the purpose of guidelines that address various stakeholders in the online dispute resolution process, and, bearing in mind that purpose, (ii) the relationship of the guidelines with the Rules. Document A/CN.9/WG.III/WP.114 suggested that guidelines ought to set out best practices for ODR providers and neutrals, while the Rules aim to establish a procedure for online dispute resolution.

8. In that context, and as further set out at paragraph 28 of document A/CN.9/WG.III/WP.127 and paragraph 10 of document A/CN.9/WG.III/WP.127/Add.1, it may be advisable not to annex guidelines to the Rules, as the legal nature and addressees of Rules and guidelines differ.

#### *Stakeholders to whom guidelines are directed*

9. At its twenty-eighth session the Working Group provided proposals in relation to the definition in the Rules of ODR providers and ODR platforms, and an alternative proposal that would provide simply for an ODR administrator, the precise definition of which would be determined, but the purpose of which term would be to define a “centralized” entity in the Rules that would maintain claimant-facing contact and responsibility for both the legal and technical elements of a dispute (see A/CN.9/795, paras. 56-57; see also A/CN.9/WG.III/WP.127, paras. 10-13, 42).

10. It is suggested that a single, simple set of guidelines ought to be addressed to the ODR platform/provider/administrator, to permit a flexible evolution of the ODR system such that guidelines would not be quickly rendered obsolete. For the purposes of this note, the word “administrator” is used to address both entities without prejudice to any decision the Working Group might take in relation to defining that entity in the Rules.

11. This note sets out draft guidance in relation to ODR administrators in section B below. Guidance to neutrals is not addressed in this note; moreover the Working Group may wish to consider whether existing guidelines in relation to the conduct of arbitrators and mediators, such as those promulgated by CIArb, IBA and various arbitral institutions, provide sufficient guidance in relation to the conduct of neutrals, and could be referred to in a simple guidance document, or whether UNCITRAL should embark on further defining the principles in relation to the conduct of neutrals.

12. The Working Group may wish to consider formulating guidelines for merchants, in addition to guidelines for actors within the ODR system. Merchants will play a critical role in using and promoting the ODR system and providing information to purchasers in relation to that merchant’s use of an ODR system.

#### *Content of guidelines*

13. In considering the content of guidelines, the Working Group may wish to have regard to documents A/CN.9/WG.III/WP.110 and A/CN.9/WG.III/WP.114, which have addressed possible elements of such guidelines.

14. The Working Group may also wish to have regard to existing guidelines and protocols in the field of alternative dispute resolution and online dispute resolution. A number of these are listed on the UNCITRAL website,<sup>2</sup> as well as at paragraph 32 of document A/CN.9/716,

<sup>2</sup> [www.uncitral.org/uncitral/publications/online\\_resources\\_ODR.html](http://www.uncitral.org/uncitral/publications/online_resources_ODR.html).

which list is replicated here for ease of reference: American Bar Association Task Force on E-commerce and ADR, Recommended best practices for online dispute resolution service providers;<sup>3</sup> Final Report and Recommendations of the American Bar Association's Task Force on Electronic Commerce and Alternative Dispute Resolution, Addressing Disputes in Electronic Commerce;<sup>4</sup> Alternative Dispute Resolution Guidelines Agreement reached between Consumers International and the Global Business Dialogue on Electronic Commerce;<sup>5</sup> European Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes;<sup>6</sup> and European Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes not covered by Recommendation 98/257/EC.<sup>7</sup>

15. This note does not distinguish between guidelines for ODR proceedings ending in a non-binding stage, and ODR proceedings that end in a binding arbitration stage, although the Working Group may wish to consider whether additional guidance would be appropriate for proceedings involving an arbitration. Nor does this note distinguish between guidance for disputes arising out of B2B transactions as opposed to B2C transactions, but it is suggested that general guidance would be equally relevant to both.

## B. Proposed topics to be addressed in draft guidelines

16. Draft guidelines for ODR providers, platforms or administrators might address, inter alia, the following topics.

### Fair process and independence

#### *Fair process*

17. The guidelines ought to emphasise, by way of basic principles, that all disputing parties in the ODR proceedings are entitled to a fair ODR process.

#### *Neutrality and independence of ODR providers, platforms and neutrals*

18. Guidelines could underline the principle of neutrality of the various stakeholders in the ODR process, and establish clear procedures in relation to challenges to neutrality (see A/CN.9/WG.III/WP.114, Principles 2 and 3).

### Modification of the Rules and logos

#### *Modification of the Rules*

19. Guidelines might address the possibility of ODR administrators modifying the Rules in relation to minor logistical points (for example, modifying timelines set out in the Rules), and/or in relation to more fundamental modifications (for example, offering only a Track I or a Track II proceeding, but not both). Guidelines might wish to address the desirability of any consequential amendments to the title or marketing of the Rules further to any such modifications being made.

20. Guidelines could clarify that the Rules, in the form used by the ODR provider, ought to be clearly and easily available on the ODR provider's website.

#### *United Nations logo*

21. It is suggested that guidelines ought to address the fact that whilst an administrator would in no circumstances be entitled to use the UNCITRAL or other United Nations logo to promote its use of the Rules, it would be able to state that it is using the UNCITRAL ODR Rules as a basis for its dispute resolution procedure (see para. 12, document A/CN.9/WG.III/WP.124).

<sup>3</sup> [www.abanet.org/dispute/documents/BestPracticesFinal102802.pdf](http://www.abanet.org/dispute/documents/BestPracticesFinal102802.pdf).

<sup>4</sup> [www.abanet.org/dispute/documents/FinalReport102802.pdf](http://www.abanet.org/dispute/documents/FinalReport102802.pdf).

<sup>5</sup> [www.gbd-e.org/pubs/ADR\\_Guideline.pdf](http://www.gbd-e.org/pubs/ADR_Guideline.pdf).

<sup>6</sup> COM (1998) 198 final — Official Journal L 115 of 17.4.1998.

<sup>7</sup> COM (2001) 161 — Official Journal L 109 of 19.4.2001.



22. The Working Group might wish to bear in mind that no oversight mechanism exists within the system being designed in relation to the work and functioning of ODR administrators, although as set out in paragraph 13 of document A/CN.9/WG.III/WP.124, private or government entities might decide to take on such an oversight role.

### **Transparency/publication/disclosure**

#### *Publication of information relating to operational matters*

23. Principle 4 of document A/CN.9/WG.III/WP.114 proposes that the ODR provider “shall publish, on its website, [clear, comprehensible, and accurate information, including] its fees, ODR procedures, potential recourses against decisions, enforcement procedures, complaint handling processes against the ODR provider or neutral and practices regarding the treatment of information. This information is brought expressly to the attention of users prior to their acceptance of the ODR process.”

24. In addition to those categories of information, the Working Group also may wish to consider that the ODR administrator ought to make public and easily accessible: (i) lists of neutrals and information in relation to its neutrals; (ii) a breakdown of fees and costs it charges to parties; and (iii) any financial relationship between the administrator (or ODR provider or platform specifically) and merchants; (iv) ODR administrators’ data protection and privacy policies; (v) the language or languages in which the proceedings can be conducted by that ODR administrator; (vi) the content of rules it is using, whether those be the UNCITRAL ODR Rules or a modified version thereof; and (vi) the time frame for each stage of proceedings. Many of these matters are addressed further below.

#### *Statistics and/or other information about the award*

25. The Working Group may wish to consider what type of information in respect of recommendations and awards the ODR provider ought to be encouraged to make public. The Working Group has previously considered whether it would be desirable or practical for the ODR administrator to publish awards, with due exclusion of identifying information of parties; or to publish the reasoning set out in awards (see A/CN.9/739, para. 135, A/CN.9/762, para. 39; see also Principle 7 of A/CN.9/WG.III/WP.114).

26. The Working Group has also considered whether, and likely as an alternative, statistics ought to be aggregated on an anonymous basis and published per ODR provider (A/CN.9/769, para. 98). It has also been suggested that the publication of statistics and summaries of decisions in relation to ODR proceedings was a matter to be addressed in a document setting out guidelines for ODR providers (A/CN.9/769, para. 98). It is suggested that, at least for Track II proceedings, the publication of statistics, rather than any detailed publication of recommendations or the reasoning therein, would be a more useful metric for consumer or other public reference.

27. If the Working Group decides that publication of statistics is desirable, it may wish to consider what types of statistics ought to be published, bearing in mind both benefit to the public and the burden to the ODR administrator of so publishing these. Examples of what such statistics might address include: number of disputes solved in favour of sellers/purchasers; the average time for resolving a dispute; and the percentage of cases resolved at the first, second or third stage of proceedings.

28. Guidelines might provide that statistics ought to be published at a certain frequency and in a way that permits easy inspection by the public.

#### *Contracts and relationships with other entities in the process*

29. An area that might warrant consideration in guidelines for ODR administrators is whether the existence, and possibly the content, of any contract or financial relationship it maintains with merchants, be made publicly available.

30. The Working Group may also wish to consider whether the relationship between an ODR provider and an ODR platform (and the nature of that relationship: e.g., contractual, or whether the ODR provider and platform form part of the same entity) ought to be specified. Information that might be made publicly accessible could include which entity is responsible for which elements of the online proceeding; the Working Group will recall that it discussed

that issue in the context of liability of an ODR platform or provider for the conduct towards end-users (see A/CN.9/WG.III/WP.127, para. 12; A/CN.9/795, para. 53).

#### *Relationship with neutrals*

31. Guidance might be provided as to an ODR administrator's relationship with neutrals, including guidance in relation to selection practices, methods of ensuring neutrals' neutrality, and the qualifications required of a neutral, as well as the need to ensure transparency of its standards in this respect. The Working Group suggested at its twenty-seventh session that guidance for ODR providers could address issues of timeliness of neutral decision-making including, for example, replacement of the neutral should he or she fail to undertake his or her duties in a timely way (see A/CN.9/769, para. 96).

32. In relation to an ODR administrator's selection of neutrals, the draft Rules no longer require neutrals to be selected from a qualified list maintained by an ODR provider, but the Working Group considered that as ODR administrators might maintain such lists in practice, that the guidelines might wish to address such lists (A/CN.9/795, para. 126), and in particular, whether the names and identifying information of each neutral and any other relevant information in relation to that neutral (see also draft article 9 of the Rules as contained in paragraph 8 of document A/CN.9/WG.III/WP.127/Add.1). The Working Group may wish to consider, however, whether providing such information publicly would in practice be of assistance to users of online dispute resolution processes.

#### **Confidentiality, processing and transfer of information, data security, and archiving**

33. The Working Group may wish to consider how guidelines ought to address issues of confidentiality and data protection (A/CN.9/795, para. 123). Guidelines might also address the need for an ODR administrator to provide robust data security.

34. The Working Group may wish to consider how the processing of data ought to be addressed in the guidelines, in particular in relation to confidentiality, any transfer of data to other entities, and the availability of information in relation to the ODR provider or platform's policies in respect of such data processing.

35. Guidelines may outline the length of time ODR administrators ought to retain information, and the question of automatic deletion of data after a certain period of time.

#### **Detail in relation to administering disputes under the Rules**

##### *Meaning of certain terms in the Rules applicable to ODR providers*

36. The guidelines might address the meaning of non-specific phrases in the Rules — for example, the Rules provide for an ODR provider “promptly” to communicate acknowledgement of receipt of communications (draft article 3(6)) and to notify parties of the existence of certain communications on the platform.

37. In relation to the term “low-value”, which has not been defined in the Rules or the commentary thereto the Working Group may wish to consider whether the Guidelines ought to provide generic guidance as to the meaning of that term, or whether it ought simply to provide discretion to ODR providers/administrators to set specific thresholds for disputes administered by them (see A/CN.9/739, para. 16; A/CN.9/795, paras. 25-26).

##### *Receipt of communications in the proceedings by disputing parties*

38. The Rules currently address receipt/deemed receipt, and the ability of the neutral to extend certain deadlines should it have reason to believe a communication has not been received.

39. The Working Group has previously considered whether the detail of receipt might be a matter best addressed in guidelines, including in relation to automatic acknowledgements of receipt via a platform (A/CN.9/739, para. 57). The Working Group may also wish to have regard to article 15 of the UNCITRAL Model Law on Electronic Commerce, article 10 of the United Nations Convention on the Use of Electronic Communications in International Contracts, and paragraph 183 of the explanatory note to the latter convention.

*Timelines*

40. Guidelines might provide detail as to the meaning of deadlines specifying “days” or “calendar days” when parties are based in different jurisdictions or time zones.

**Residual authority** (See also A/CN.9/WG.III/WP.110, para. 14)

41. The Working Group may wish to provide guidance as to both the extent of residual authority vested in an ODR provider, as well as, possibly, guidance on the exercise of that authority. For example, under draft article 9, paragraph (6) (of Track II proceedings, as set out in paragraph 8 of document A/CN.9/WG.III/WP.127/Add.1), where a party objects to the appointment of a neutral, the ODR provider “shall make a determination ... regarding whether that neutral shall be replaced.” The Working Group may wish to consider whether, if the ODR provider is to have such residual authority, guidance is enumerated in relation to the exercise of that discretion.

**Guidance to parties by an ODR provider**

42. The Working Group may wish to consider whether guidelines ought to encourage ODR administrators to provide guidance to the parties to a dispute in relation to the functioning of the Rules, whether in the form of “FAQs”, support hotlines, or otherwise.

43. Such party-directed information might also set out deadlines for each stage of proceedings, matters related to costs, the format in which to submit supporting evidence, enforcement of settlement agreements, recommendations by a neutral and awards by a neutral.

44. The Working Group has also suggested that an ODR administrator ought to communicate specific upcoming deadlines to parties as ODR proceedings are ongoing, to ensure that parties would be duly notified of deadlines under the Rules (A/CN.9/795, para. 110).

**Compliance or “private enforcement” mechanisms**

45. The Working Group may wish to consider, after determination of how the Rules ought to address compliance mechanisms (see A/CN.9/WG.III/WP.124; and para. 87 of document A/CN.9/WG.III/WP.127), the type of guidance the guidelines could usefully provide in that respect.

46. Document A/CN.9/WG.III/WP.114 proposes, as its Principle 11, “[t]he ODR provider shall take measures to encourage compliance with ODR decisions, which may include: requiring that a security be posted; seeking undertakings to comply from the [disputing] parties at the outset of the ODR process; or facilitating payments of awards”.

47. The Rules in draft article 7(4) set out a similar principle, notably that “parties are encouraged to abide by the recommendation” made by the neutral, “and the ODR provider may introduce the use of trustmarks or other methods to identify compliance with recommendations.” The Working Group might consider whether such encouragement to parties, and the ability of the ODR provider to introduce the use of trustmarks or other compliance methods, may be better placed in guidance to the ODR provider, or even in guidance to parties by an ODR provider (see paras. 42-44 above).

**Technical issues***Technology*

48. Guidelines may set out a best practice requirement for the platform to be accessible at all times, 24 hours a day, 7 days a week, 365 days a year, save for scheduled maintenance periods. Guidelines may set out corresponding extension of deadlines during maintenance periods.

49. The Working Group may wish to consider whether other technology issues or requirements should be addressed in guidelines and/or the extent to which such issues ought or are able to be prescribed.

*Technical problems*

50. Guidelines might address matters relating to disruption of proceedings caused by technical problems, and how to maintain the integrity of proceedings and fairness to the disputing parties in such an exigency.

**Legal issues arising in the context of administering a dispute resolution**

51. The Working Group may wish to consider whether the Guidelines ought to address issues of procedure only, or whether they ought also to address legal issues that might arise in the context of administering online disputes. Such issues might include:

- (i) Whether, if a respondent does not participate in proceedings and a recommendation or award is issued in default, any additional steps need to be taken to ensure the respondent has been made aware of the proceedings against it;
- (ii) How a settlement agreement ought to be recorded on the platform, and whether that process ought to be different prior to the appointment of a neutral, and after the appointment of a neutral (A/CN.9/WG.III/WP.127, para. 75);
- (iii) Whether the place of the ODR administrator has any bearing on the ODR proceedings (analogous to a “seat” of arbitration).

52. The Working Group may wish to consider whether issues likely to be governed by national, regional or international law, such as limitation or prescription periods, and data protection and privacy, ought to be addressed in guidelines, and if so, to what level of detail.

**Language**

53. The Working Group may wish to provide guidance to an ODR administrator in relation to language issues, including the need to make transparent the languages in which its services are offered (see Principle 8 of A/CN.9/WG.III/WP.114; see also A/CN.9/762, para. 71) and/or the need to ensure that its system, and neutrals are sensitive to the different language needs of its users (see A/CN.9/762, para. 74).

**Fees**

54. Guidelines could set out a general principle that fees and costs of the ODR process must be reasonable and transparent. In light of the global nature of the Rules and their applicability to different regions and different types of disputes (business-to-business and business-to-consumer), the Working Group may wish to consider the extent to which further guidance is desirable or possible in relation to fees and costs charged by an ODR administrator.

### III. SECURITY INTERESTS

#### A. Report of the Working Group on Security Interests on the work of its twenty-fourth session (Vienna, 2-6 December 2013)

(A/CN.9/796)

[Original: English]

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#### I. Introduction

1. At its present session, Working Group VI (Security Interests) continued its work on the preparation of a model law on secured transactions (the “draft Model Law”), pursuant to a decision taken by the Commission at its forty-fifth session (New York, 25 June–6 July 2012).<sup>1</sup> At that session, the Commission agreed that, upon its completion of the UNCITRAL Guide on the Implementation of a Security Rights Registry (the “Registry Guide”), the Working Group should undertake work to prepare a simple, short and concise model law on secured transactions based on the general recommendations of the UNCITRAL Legislative Guide on Secured Transactions (the “Secured Transactions Guide”) and consistent with all texts prepared by UNCITRAL on secured transactions, including the United Nations Convention on the Assignment of receivables in International Trade (the “United Nations Assignment Convention”) and the Supplement on Security Rights in Intellectual Property (the “Intellectual Property Supplement”).<sup>2</sup> The Commission also agreed that, consistent with the Commission’s decision at its forty-third session, in 2010, the topic of security rights in non-intermediated securities, in the sense of securities other than those credited in a securities account, should continue to be retained on the future work programme for further consideration, on the basis of a note to be prepared by the Secretariat, which would set out all relevant issues so as to avoid any overlap or inconsistency with texts prepared by other organizations.

<sup>1</sup> *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 105.

<sup>2</sup> *Ibid.*

2. At its twenty-third session (New York, 8-12 April 2013), the Working Group had a general exchange of views on the basis of a note prepared by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.55 and Add.1 to 4).
3. At its forty-sixth session (Vienna, 8-26 July 2013), the Commission noted that the Secretariat was in the course of preparing a revised version of the draft Model Law that would implement the mandate given by the Commission to the Working Group and facilitate commercial finance transactions.<sup>3</sup> It was agreed that the preparation of the draft Model Law was an extremely important project to complement the work of the Commission in the area of security interests and provide urgently needed guidance to States as to how to implement the recommendations of the Secured Transactions Guide. It was also agreed that, in view of the importance of modern secured transactions law for the availability and the cost of credit, and the importance of credit for economic development, such guidance was extremely important and urgent to all States at a time of economic crisis but in particular to States with developing economies and economies in transition. In addition, it was stated that the scope of the draft Model Law should include all economically valuable assets.<sup>4</sup>
4. After discussion, the Commission confirmed its decision that Working Group VI should prepare a simple, short and concise model law on secured transactions based on the recommendations of the Secured Transactions Guide and consistent with all texts prepared by UNCITRAL on secured transactions.<sup>5</sup> The Commission also agreed that the continuation of work towards developing a model law on secured transactions would be undertaken in two one-week sessions of Working Group VI (Security Interests) in the year to June 2014, and that whether that work would include security interests in non-intermediated securities would be assessed at a future time.<sup>6</sup>

## II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its twenty-fourth session in Vienna from 2 to 6 December 2013. The session was attended by representatives of the following States members of the Working Group: Argentina, Armenia, Australia, Belarus, Brazil, Canada, Colombia, Croatia, Denmark, Ecuador, El Salvador, France, Germany, Indonesia, Iran (Islamic Republic of), Italy, Japan, Jordan, Kenya, Mexico, Pakistan, Panama, Republic of Korea, Russian Federation, Spain, Switzerland, Thailand, Ukraine, United States of America and Venezuela (Bolivarian Republic of).
6. The session was attended by observers from the following States: Angola, Bolivia (Plurinational State of), Czech Republic, Dominican Republic, Iraq, Poland, Qatar, Romania and Saudi Arabia. The session was also attended by an observer from the European Union.
7. The session was also attended by observers from the following international organizations:
  - (a) *United Nations system*: The World Bank;
  - (b) *Inter-governmental organizations*: Council of Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States (IPA CIS);
  - (c) *International non-governmental organizations invited by the Commission*: American Bar Association (ABA), Commercial Finance Association (CFA), Forum for International Conciliation and Arbitration (FICACIC), International Chamber of Commerce (ICC), International Insolvency Institute (III), Moot Alumni Association (MAA), National Law Centre for Inter-American Free Trade (NLCIFT) and Union Internationale des Huissiers de Justice et Officiers Judiciaires (UIHJ).

<sup>3</sup> *Ibid.*, *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 192.

<sup>4</sup> *Ibid.*, para. 193.

<sup>5</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 194.

<sup>6</sup> *Ibid.*, para. 332.

8. The Working Group elected the following officers:  
*Chairman:* Ms. Kathryn SABO (Canada)  
*Rapporteur:* Ms. Denise Carla VASQUEZ WALLACH (Mexico)
9. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.56 (Annotated Provisional Agenda), A/CN.9/WG.VI/WP.57 and Addenda 1-4 (Draft Model Law on Secured Transactions).
10. The Working Group adopted the following agenda:
  1. Opening of the session and scheduling of meetings.
  2. Election of officers.
  3. Adoption of the agenda.
  4. Draft Model Law on Secured Transactions.
  5. Other business.
  6. Adoption of the report.

### III. Deliberations and decisions

11. The Working Group considered a note by the Secretariat entitled “Draft Model Law on Secured Transactions” (A/CN.9/WG.VI/WP.57 and Add.1 and 2). The deliberations and decisions of the Working Group are set forth below respectively in chapter IV. The Secretariat was requested to revise the draft Model Law to reflect the deliberations and decisions of the Working Group.

## IV. Draft Model Law on Secured Transactions

### A. General

12. Noting its mandate to prepare a simple, short and concise model law on secured transactions based on the recommendations of the Secured Transactions Guide and consistent with all texts prepared by UNCITRAL on secured transactions (see paras. 1 and 3 above), the Working Group began its deliberations with a general exchange of views. While it was generally agreed that the draft Model Law should be simple, short and concise, and consistent with the recommendations of the Secured Transactions Guide and all texts of UNCITRAL on secured transactions, differing views were expressed as to the manner in which that objective could be achieved. One view was that the Working Group should first prepare a list of contents or road map that would generally outline the structure of the draft Model Law. It was stated that, once agreement had been reached on those issues, the Working Group could begin considering the specific articles of the draft Model Law. It was also observed that the draft Model Law should deal with the most important issues and the basic principles to be extracted from the recommendations of the Secured Transactions Guide, while other issues and exceptions could be set out subsequently in a summary fashion or even in an annex to the draft Model Law. In that connection, by way of example, it was mentioned that: (a) the chapter on third-party effectiveness could focus on the most common methods of possession and registration, while the question whether any further qualification was necessary to deal with control could be addressed at a later stage; and (b) the chapter on the registry system could be limited to certain general principles, while the details could be referred to the registry regulations. It was also pointed out that the draft Model Law should be sufficiently flexible to accommodate differences among the various legal traditions.

13. Another view was that the draft Model Law should generally follow the structure of the Secured Transactions Guide and any adjustments that would need to be made should be considered at the time each particular chapter or section of the draft Model Law would be discussed. It was stated that, while the primary focus of work should be on core commercial assets, the draft Model Law should have as broad a scope as the Secured Transactions Guide so as to avoid inadvertently fragmenting the law and thus potentially creating gaps and

inconsistencies. In that connection, it was pointed out that there was no need to exclude intellectual property from the scope of the draft Model Law. It was also mentioned that the provisions on acquisition financing were so important and necessary for an efficient law that they should be included in the draft Model Law itself. In that connection, the concern was expressed that enacting States might view matters addressed in an annex as less important and leave them out of their secured transactions law. In order to address that concern, the suggestion was made that other ways might be found to reflect optional text that an enacting State might implement depending on its particular needs (for example, a reference to the recommendations of the Secured Transactions Guide).

14. After discussion, the Working Group agreed that, while the draft Model Law should be simple, short and concise, and in line with the recommendations of the Secured Transactions Guide and all UNCITRAL texts on secured transactions, rather than trying to establish a blueprint or road map at the outset, the Working Group should consider the issues in the order they were addressed in the working papers before it, which were generally considered to form an excellent basis for discussion. In addition, it was agreed that the Working Group could identify and address key issues and basic principles, leaving additional issues and principles for discussion at a later stage. Moreover, it was agreed that, within the parameters set out by the recommendations of the Secured Transactions Guide, the draft Model Law should be sufficiently flexible to accommodate approaches taken in various jurisdictions.

## **B. Preamble (A/CN.9/WG.VI/WP.57)**

15. Noting the diverging legislative approaches taken in various jurisdictions, the Working Group agreed that the preamble should be placed in a commentary, appropriately revised to deal more succinctly with the purpose of the draft Model Law. It was widely felt that the commentary should clarify that it would be up to each enacting State to include that text in a preamble, or a provision in or report on its law. In addition, it was agreed that, in line with the practice of UNCITRAL with respect to model laws, the commentary should take the form of a short guide to enactment of the draft Model Law that would include a general part and article-by-article remarks. In that connection, it was agreed that the guide to enactment should not duplicate but rather include cross-references to the Secured Transactions Guide, where possible or necessary.

## **C. Chapter I. Scope of application and general provisions (A/CN.9/WG.VI/WP.57)**

### **Article 1. Scope of application**

16. With respect to article 1, a number of suggestions were made. One suggestion was that, with the exception of the deference to consumer protection legislation in subparagraph 1 (b), subparagraphs 1 (a) through (d) should be deleted, as they unnecessarily repeated points that were sufficiently made in the chapeau of paragraph 1. Another suggestion was that paragraph 2 should be revised to simply state that, subject to chapter VII, section I, the draft Model Law applied to outright assignments of receivables. Yet another suggestion was that subparagraph 3 (a) should be revised to exclude the right to draw under an independent undertaking and the discussion on subparagraphs 3 (b) through (h) should be deferred until the Working Group had an opportunity to consider the draft Model Law as a whole. All those suggestions received sufficient support.

17. After discussion, the Working Group agreed that the chapeau of paragraph 1 should be retained with appropriate adjustments, while the examples given in subparagraphs 1 (a) through (d) should be discussed in the guide to enactment of the draft Model Law. In addition, it was agreed that the deference to consumer-protection legislation included in subparagraph 1 (b), should be reflected in a separate article. Moreover, it was agreed that paragraph 2 should be retained, revised as suggested (see para. 16 above). Finally, it was agreed that subparagraph 3 (a) should be revised as suggested (see para. 16 above), while paragraph 3 as a whole should be placed within square brackets indicating that the Working



Group had postponed discussion until it had an opportunity to consider the draft Model Law as a whole.

#### **Article 2. Definitions**

18. The Working Group agreed that article 2 should be placed within square brackets indicating that the Working Group had deferred discussion until it had an opportunity to consider the draft Model Law as a whole.

#### **Article 3. Party autonomy**

19. Diverging views were expressed as to whether article 3 should be retained or deleted. One view was that article 3 should be deleted. It was stated that article 3 dealt with a contract law issue and did so in an incomplete way as: (a) paragraph 1 did not deal with an agreement between a secured creditor and a debtor of a receivable, and an agreement between a secured creditor and another secured creditor or a buyer of an encumbered asset; and (b) paragraph 2 did not provide for an agreement that might affect also the obligations of a third party or might benefit a third party. It was also observed that, in any case, several other articles of the draft Model Law (for example, article 11) sufficiently dealt with the issue of party autonomy and thus a general rule on party autonomy was not necessary.

20. Another view was that article 3 should be retained as it dealt with three issues of property law that might not be sufficiently addressed in all jurisdictions, the principle of party autonomy with respect to the property effects of a security agreement as between the parties, the limits of party autonomy in that regard and the fact that, unless otherwise provided in the draft Model Law, the provisions dealing with the property effects of a security agreement between the parties were applicable in the absence of contrary agreement of the parties.

21. After discussion, the Working Group agreed that article 3 should be placed within square brackets indicating that the Working Group deferred discussion of article 3 until it had an opportunity to consider the draft Model Law as a whole (see paras. 43 and 101 below).

#### **Article 4. Electronic communications**

22. After discussion, the Working Group agreed that article 4 should be deleted and the matters addressed therein should be addressed in the guide to enactment of the draft Model Law.

### **D. Chapter II. Creation of a security right and rights and obligations of the parties (A/CN.9/WG.VI/WP.57)**

#### **Article 5. Creation of a security right**

23. It was widely felt that article 5 should be retained as it dealt with a key issue that should be addressed in the draft Model Law. However, with respect to the structure and the formulation of article 5, a number of suggestions were made. One suggestion was that, while paragraph 1 could be revised to clarify that it referred to contractual security rights to which the draft Model Law applied, the words “except as otherwise provided in other law”, which were intended to refer to security rights created by operation of law, should be deleted, as that point was sufficiently covered in article 1, paragraph 1. Another suggestion was that paragraph 1 should be merged with articles 6 and 7 in a new article under the heading “security agreement”. Yet another suggestion was that paragraph 2 should be set out in a separate article, dealing with the effects of a security agreement, which could be placed right before article 10. Yet another suggestion was that paragraphs 3 and 4 should be placed in a separate article under the heading “time of creation of a security right”. Yet another suggestion was that paragraph 3 could be deleted as stating the obvious and paragraph 4 could be merged with article 9, subparagraph 1 (b), under the heading “future assets”.

24. The suggestions made with respect to paragraphs 1 and 2 (see para. 23 above) received sufficient support. With respect to paragraph 3, the suggestion was made that it would be useful to preserve in paragraph 1 a statement that a security right would not be created until the grantor acquired rights in the asset or the power to encumber it. With respect to

paragraph 4, the suggestion was made that it should be revised to provide that a security right might be created in (or a security agreement might relate to) a future asset and be placed in a separate article that would follow article 5 as revised. Those suggestions received sufficient support. After discussion, it was agreed that article 5 should be revised to address all of the suggestions that received sufficient support.

#### **Article 6. Minimum content of a security agreement**

25. There was broad support in the Working Group for the policy of article 6 (which would become part of revised article 5; see paras. 23 and 24 above). However, differing views were expressed as to whether subparagraph (a) should be retained. One view was that subparagraph (a) should be deleted. It was stated that that “intent” was a matter of contract law and reference to “intent” could give rise to questions, such as whether the reference was to subjective or objective intent. In addition, it was observed that reference to “intent” could be inadvertently misunderstood and make it difficult for a court to recharacterize a transaction that, irrespective of what the parties subjectively intended, objectively served security functions. Moreover, it was pointed out that, in any case, subparagraphs (b) through (d) were sufficient to reflect the intent of the parties. The prevailing view, however, was that subparagraph (a) should be revised and retained. It was widely felt that the objective intent of the parties to enter into a transaction that would have the effect of creating a security right should be preserved. After discussion, it was agreed that subparagraph (a) should be retained but revised to refer to the effect of an agreement creating a right that served security functions.

26. With respect to subparagraph (c), the concern was expressed that the words “if any” might raise a doubt as to whether a secured obligation was a necessary element of a security agreement, while, at the same time, were not sufficient to clarify that in an outright transfer of a receivable there would be no secured obligation. In order to address that concern, the suggestion was made that article 1, paragraph 2, should be revised to clarify that the draft Model Law applied to outright transfers of receivables “to the extent possible”. That suggestion was objected to. It was stated that such wording would introduce uncertainty as to the application of the draft Model Law to outright transfers of receivables. It was also observed that the approach taken in the Secured Transactions Guide and reflected also in the draft Model Law to define the term “security agreement” so as to include for convenience of reference an agreement for an outright transfer of a receivable (see article 2, subpara. (bb)) should be considered carefully. In that connection, the suggestion was made that the term “security right” should also be defined to include the right of an owner of a receivable (see article 2, subpara. (cc)). After discussion, it was agreed that all provisions of the draft Model Law should be reviewed to determine whether they were appropriately formulated or should be revised to apply to outright transfers of receivables.

27. With respect to subparagraph (d), the suggestion was made that reference should be made to the “identification” (rather than to the “description”) of the encumbered assets, as pursuant to an oral security agreement (which, under article 7, para. 2, could create a possessory security right) the secured creditor would obtain possession but would not need to describe the encumbered assets. Noting that article 6 applied to any security agreement, whether written or oral, the Working Group agreed that any appropriate modification should be made to ensure that that point was clearly reflected in article 6.

28. In the discussion, the suggestion was made that, if the draft Model Law were to apply to security rights in intellectual property, the remarks on subparagraph (d) in the guide to enactment should include a cross reference to the discussion of the description of intellectual property in a security agreement (see Intellectual Property Supplement, paras. 82-85). There was sufficient support for that suggestion.

29. With respect to subparagraph (e), the suggestion was made that it should be deleted. That suggestion was objected to. It was stated that in States that required that the maximum amount be mentioned in the security agreement, a security agreement that failed to do so was ineffective. The suggestion was also made that the words “if any” should be deleted as they could be inadvertently misunderstood to mean that an indication of the maximum amount in the security agreement would not be necessarily required even in a State that chose to include a provision along the lines of subparagraph (e) in its secured transactions law. There was sufficient support for that suggestion. In response to a question, it was

observed that, while it would be logical to have a maximum amount indicated in a written security agreement, an indication of a maximum amount could also be included in an oral security agreement. After discussion, the Working Group agreed that subparagraph (e) should be retained within square brackets, without the words “if any”, and appropriate clarifications of the points made in the discussion should be included in the guide to enactment.

#### **Article 7. Form of a security agreement**

30. While broad support was expressed for the policy of article 7 (which would become part of revised article 5; see paras. 23 and 24 above), a number of suggestions were made as to the formulation of article 7, paragraph 1. One suggestion was that the Working Group should either decide whether a security agreement ought to be “concluded in” or “evidenced by” a writing, or whether these two options should be presented within square brackets in paragraph 1 for enacting States to choose. It was stated that the draft Model Law should include a clear provision on the legal consequence of the failure of the parties to put their agreement in writing. It was widely felt that it would be premature for the Working Group to make a decision on that matter, and thus all suggestions should be reflected in a revised version of article 7, paragraph 1, within square brackets for further consideration. It was stated that the two options could be understood as complementary in the sense that a security agreement should be concluded or, at least, evidenced in writing. It was also observed that that was a matter of contract law and could be avoided through the use of neutral language that would indicate in some manner that the minimum content of a security agreement ought to be “contained” in a writing.

31. Another suggestion was that the words “by itself or in conjunction with the course of conduct between the parties” should be removed from article 7, paragraph 1, and discussed in the guide to enactment. It was stated that those words might inadvertently be misconstrued as meaning that a security agreement as such would not be sufficient to create a security right and that that result would depend on the circumstances. It was also stated that only the minimum content of a security agreement needed to be included in a writing. There was sufficient support for that suggestion.

32. Yet another suggestion was that the term “writing” should be qualified by reference to wording along the following lines “that satisfies the minimum content requirements of article 6”. There was sufficient support for that suggestion.

33. Yet another suggestion was that, for the reasons mentioned above (see para. 25 above), reference should be made to the grantor’s “consent” rather than “intent”. While support was expressed for that suggestion, the concern was expressed that use of the term “consent” might be understood as suggesting that the security right would be created by an act of another person that the grantor would only need to consent to. In order to address that concern, the suggestion was made that article 7, paragraph 1, should clarify that the act of the grantor created the security right.

34. In view of the fact that article 7, paragraph 1, included a reference to a “writing” and in order to ensure that that reference was understood to include an electronic communication, the suggestion was made that article 4, paragraph 1 (which the Working Group had decided to delete; see para. 22 above) should be retained. While it was agreed that the matter could be discussed in the guide to enactment, it was widely felt that article 4, paragraph 1, should not be retained. The suggestion was also made that the matter could be addressed with a definition of the term “writing” that would include the thrust of article 4, paragraph 1.

35. With respect to article 7, paragraph 2, the question was raised as to whether it should be revised to provide for fictitious possession of intangible assets. It was widely felt that the definition of the term “possession” that explained possession by reference to actual possession was consistent with the approach followed in most jurisdictions and should be preserved (see article 2, subpara. (t)).

36. After discussion, the Working Group agreed that article 7, paragraph 1, should be revised to address those suggestions that received sufficient support (see paras. 30-35 above).

### **Article 8. Obligations secured by a security right**

37. With respect to article 8, it was agreed that it should be retained as a separate article. It was also agreed that the guide to enactment should clarify that, as a matter of contract law, article 8 referred to “legally enforceable” obligations.

### **Article 9. Assets subject to a security right**

38. While broad support was expressed for the policy of article 9, a number of suggestions were made as to its formulation. One suggestion was that the words “with the exception of [any limited and specific exceptions to be set out by the enacting State]” in the chapeau of paragraph 1 should be deleted. It was stated that the chapeau should not appear to be inviting or encouraging enacting States to provide for exceptions to the types of asset that could be subject to a security right. Another suggestion was that the guide to enactment could elaborate on the possibility of such exceptions either in the secured transactions law or other law with a further explanation that any exception should be limited and described or, at least, referred to in the secured transactions law in a clear and specific manner. Yet another suggestion was that subparagraphs 1 (a) to (c) should be recast as separate paragraphs as they dealt with different issues and that the portion of the chapeau referring to any type of asset be limited to subparagraph 1 (a). With respect to subparagraph 1 (b), it was suggested that the reformulated version indicate that the security agreement might provide for a security right in future assets. Those suggestions received sufficient support.

39. Differing views were expressed as to whether paragraph 2 should be retained. One view was that paragraph 2 should be deleted. It was stated that there was no need for the draft Model Law to deal with what it did not do and, in any case, the issue could be discussed in the guide to enactment. The prevailing view, however, was that paragraph 2 should be retained. It was widely felt that there was merit in indicating that the draft Model Law respected statutory limitations in other law, qualifying the broad scope of paragraph 1. It was further suggested that the text of paragraph 2 would better fit in chapter I of the draft Model Law, reference should be made to “other law” in general (rather than to a specific provision of any other law) and the words in square brackets should be deleted as it would be uncommon for a legislation to state what it does not purport to achieve. All those suggestions received sufficient support.

40. After discussion, it was agreed that article 9, paragraph 1, should be revised and article 9, paragraph 2, should be revised and placed in chapter I of the draft Model Law (see paras. 38-39 above).

### **Article 10. Continuation of a security right in proceeds**

41. Broad support was expressed for the policy of article 10. However, a number of suggestions were made with respect to its formulation. One suggestion was that the words “including proceeds of proceeds” in paragraph 1 should be deleted as the term “proceeds” was defined to include proceeds of proceeds (see article 2, subpara. (v)). Another suggestion was that paragraphs 2 and 3 should be revised to refer to proceeds in the form of money or funds credited to a bank account (in line with recommendation 20 of the Secured Transactions Guide). Yet another suggestion was that a separate article should be introduced in the draft Model Law to deal with types of commingled proceeds other than cash proceeds (in line with recommendation 22 of the Secured Transactions Guide). Those suggestions received sufficient support. After discussion, the Working Group agreed that article 10 should be revised as suggested and a new article should be prepared to deal with commingled non-cash proceeds.

42. With respect to security rights in attachments to movable and immovable property, the Working Group agreed that, while the issue was of importance, it could usefully be discussed in the guide to enactment with appropriate cross-references to the relevant parts of the Secured Transactions Guide.

### **Article 11. Rights and obligations of the parties**

43. A number of concerns were expressed with respect to article 11. One concern was that its heading did not reflect accurately its contents. Another concern was that it appeared to

indicate that there were no rights and obligations of the parties other than those set out in the security agreement (i.e., under the draft Model Law) or that there were no rights and obligations of the parties other than mutual (i.e., unilateral). Yet another concern was that it was not sufficiently clear whether article 11 was intended to establish a hierarchy among the sources of rights and obligations of the parties or whether it was intended to deal only with pre-default or also with post-default rights and obligations of the parties (addressed in article 57 of the draft Model Law). Yet another concern was that article 11 duplicated article 3 (party autonomy). In order to address those concerns, it was suggested that article 11 should be deleted and issues relating to party autonomy should be addressed in article 3 and discussed in the guide to enactment. All those suggestions received sufficient support. It was also suggested that party autonomy with respect to post-default rights and obligations of the parties might also need to be addressed in article 3 so as to have a comprehensive article addressing the principle of party autonomy early in the draft Model Law. However, some doubt was expressed as to whether such a comprehensive article might be necessary as the principle of party autonomy was normally part of contract law. Deferring discussion of that latter issue until it had an opportunity to consider article 57 of the draft Model Law (see paras. 19 and 20 above, and para. 101 below), the Working Group agreed that article 11 should be deleted and party autonomy issues should be addressed in article 3 and discussed in the guide to enactment.

#### **Article 12. Mandatory rules**

44. While it was generally agreed that article 12 should be retained, a number of suggestions were made. One suggestion was that its heading should be revised to reflect its specific contents. Another suggestion was that it should be revised to include a complete list of rules, which the parties could not derogate from or vary by agreement. Yet another suggestion was that the guide to enactment should discuss the steps that the secured creditor ought to take to ensure that the grantor was placed in the same position it occupied prior to the creation of the security right (see Secured Transactions Guide, ch. VI, para. 38). There was sufficient support for all those suggestions. After discussion, the Working Group agreed that article 12 should be revised as suggested.

#### **Article 13. Non-mandatory rules**

45. It was widely felt that article 13 was useful to set out rules that could promote the policy objectives of the draft Model Law, apply in the absence of contrary agreement of the parties, reflect the normal expectations of the parties and, at the same time, provide guidance to the parties as to the issues they might wish to address in their agreement. However, a number of suggestions were made. One suggestion was that subparagraph (b) should be revised to provide that the secured creditor ought to apply the revenues generated from an encumbered asset in the secured creditor's possession or control to the payment of the secured obligation. There was not sufficient support for that suggestion. It was noted that, where the secured creditor was in possession or control of an encumbered asset, it made sense for the secured creditor to collect any revenues and, unless otherwise agreed (i.e., to turn them over to the grantor), the secured creditor should have the right to apply them to the secured obligation (see Secured Transactions Guide, ch. VI, para. 55).

46. Another suggestion was that, for reasons of clarity, the two issues addressed in subparagraph (b) should be set out separately. Yet another suggestion was that subparagraph (c) should be revised to clarify that a secured creditor should be entitled to inspect encumbered assets in the possession of the grantor "at all reasonable times". In that connection, it was widely felt that the reasonableness test should apply not only to the timing but also to all aspects of an inspection, including its place, manner and frequency. However, differing views were expressed as to whether the principle that, in exercising their rights, the parties should act in good faith and in a commercially reasonable manner should be set out in a general provision of the draft Model Law. One view was that such a general provision would be useful and render unnecessary the repetition of that principle throughout the draft Model Law. Another view was that, while the principle of good faith should apply to all rights of the parties, the commercial reasonableness test should apply only to post-default rights and obligations of the parties.

47. While it was generally agreed that what was commercially reasonable would depend on the circumstances of each case, the view was expressed that examples should be set out in the guide to enactment to clarify the meaning of the term “commercial reasonableness”. It was stated that, without such elaboration of examples, subparagraph (b) in its current formulation could introduce uncertainty as to when a secured creditor might be entitled to use an encumbered asset. In addition, it was observed that the meaning of commercial reasonableness would also depend on whether the grantor was a consumer or a micro-business. In that connection, it was pointed out that the draft Model Law would not override any consumer-protection rule and that standard might apply also to micro-businesses.

48. In response to a question as to whether an agreement between the grantor and the secured creditor under article 13 could affect the rights of a third party in possession of an encumbered asset, it was stated that article 13 would apply in such cases only if the third party acted as a representative of the secured creditor; otherwise, under article 3, an agreement between the grantor and the secured creditor should not affect the rights of a third party. It was agreed that that matter could be usefully clarified in the guide to enactment.

49. After discussion, the Working Group agreed that article 13 should be revised to address all the above-mentioned suggestions that received sufficient support (see paras. 45-48 above).

## **E. Chapter III. Effectiveness of a security right against third parties (A/CN.9/WG.VI/WP.57)**

### **Article 14. Achieving third-party effectiveness**

50. While it was agreed that a provision setting out the methods of achieving third-party effectiveness was useful, a number of concerns were expressed with respect to article 14. One concern was that, in its current formulation, paragraph 1, was confusing as it created the impression that third-party effectiveness might be achieved partially. In order to address that concern, it was suggested that paragraph 1 should be revised to clarify, in line with recommendations 29 and 30 of the Secured Transactions Guide, that a security right would not be effective against third parties, unless one of the methods necessary to achieve third-party effectiveness would be followed. There was general support for that suggestion.

51. Another concern was that, while the policy pursued in paragraphs 2 and 3 was generally acceptable, that policy was a matter of insolvency law rather than secured transactions law. In order to address that concern, the suggestion was made that those paragraphs should be deleted. While there was sufficient support for that suggestion, it was widely felt that the treatment of a security right in the case of the grantor’s insolvency was a matter of paramount importance and merited discussion in the guide to enactment. It was also widely felt that, in order to provide guidance to States as to how to address those issues in their insolvency law, the thrust of paragraphs 2 and 3 could be set out in the guide to enactment with appropriate cross-references to the UNCITRAL Legislative Guide on Insolvency Law and the insolvency chapter of the Secured Transactions Guide.

52. After discussion, the Working Group agreed that paragraph 1 should be revised as suggested and paragraphs 2 and 3 should be deleted and discussed in the guide to enactment, included in an annex or otherwise preserved as suggested (see paras. 50-51 above).

### **Article 15. General method for achieving third-party effectiveness: registration**

53. A number of concerns were expressed with respect to article 15. One concern was that its heading did not exactly match its contents (which included a reference to methods other than registration). Another concern was that it addressed matters already addressed in chapter II (creation). Yet another concern was that article 15 would be unnecessary if article 14 addressed the methods for achieving third-party effectiveness in a general manner. In order to address those concerns, the suggestion was made that article 15 should be deleted or revised to set out the general and specific methods of third-party effectiveness, as well as the exceptions thereto (including the methods addressed in articles 16-18). There was sufficient support for those suggestions. After discussion, the Working Group agreed that article 15 should be deleted or revised as suggested.

**Article 16. Different third-party effectiveness methods for different types of asset**

54. After discussion, the Working Group agreed that article 16 should be deleted and the issues addressed therein should be dealt with in revised article 14 or revised article 15.

**Article 17. Third-party effectiveness of a security right in a tangible asset by possession**

55. After discussion, the Working Group agreed that article 17 should be deleted and the issues addressed therein should be dealt with in revised article 14 or revised article 15. It was also generally agreed that, as possession was defined to mean actual possession (see article 2, subpara. (t)), possession as a third-party effectiveness method applied only to tangible assets.

**Article 18. Third-party effectiveness of a security right in a movable asset subject to a specialized registration or a title certificate system**

56. After discussion, the Working Group agreed that article 18 should be deleted and the issues addressed therein should be dealt with in revised article 14 or revised article 15. It was also generally agreed that all that needed to be stated to reflect the thrust of article 18 was that a security right in a movable asset that was subject to specialized registration under other law could also be made effective against third parties by registration in a specialized registry.

**Article 19. Automatic third-party effectiveness of a security right in proceeds**

57. While broad support was expressed for the policy of article 19, several suggestions were made as to its formulation. One suggestion was that the words “in a generic way” in paragraph 1 should be replaced by a word along the following lines “sufficiently”. Another suggestion was to review words such as “of this article” in paragraph 2 (and throughout the draft Model Law) and “such proceeds” in paragraph 3. All those suggestions received sufficient support. After discussion, the Working Group agreed that article 19 should be revised as suggested.

**Article 20. Continuity in third-party effectiveness of a security right upon change of method of third-party effectiveness**

58. Some doubt was expressed as to whether article 20 addressed third-party effectiveness issues and should be retained in chapter III or rather priority issues and should be moved to chapter V. The concern was also expressed that article 20 might be unnecessarily complex. In order to address that concern, it was suggested that article 20 should be revised to state that the method of achieving third-party effectiveness might be changed and, if there was no lapse, third-party effectiveness continued. After discussion, the Working Group agreed that article 20 should be revised as suggested and retained within square brackets for further consideration.

**Article 21. Lapse in third-party effectiveness or advance registration**

59. Differing views were expressed as to whether the bracketed text in article 21 should be retained. One view was that the bracketed text should be retained. It was stated that, without that reference, article 21 would simply reiterate the principle indicated in other articles of the draft Model Law that third-party effectiveness could be established and would thus be unnecessary. Another view was that the bracketed text should be deleted. It was observed that, if the bracketed text was retained, article 21 would essentially amount to a priority rule that would belong in chapter V (e.g., article 46).

60. The concern was also expressed that, in its current formulation, article 21 dealt with too many issues. In order to address that concern, it was suggested that article 21 should be revised to clarify that: (a) if there was a lapse, third-party effectiveness discontinued, but could be re-established by any of the methods provided in the draft Model Law; and (b) when re-established, third-party effectiveness would date from the time when it would be re-established. As to the latter point, the view was expressed that it might be better placed in chapter V on priority.

61. After discussion, the Working Group agreed that article 21 should be revised as suggested (see paras. 59-60 above) and retained within square brackets for further consideration.

#### **Article 22. Effect of a transfer of the encumbered asset**

62. In view of the broad support expressed for the policy of article 22, the Working Group agreed that it should be retained.

#### **Article 23. Continuity in third-party effectiveness upon change of the governing law**

63. While some doubt was expressed as to the policy of article 23, the Working Group noted that it was based on recommendation 45 of the Secured Transactions Guide, and agreed that it should be retained, properly revised and explained in the guide to enactment.

### **F. Chapter IV. The registry system (A/CN.9/WG.VI/WP.57/Add.1)**

#### **General**

64. The view was expressed that the guide to enactment should clarify that, depending on its legislative methods, each enacting State should consider whether to deal with registry-related issues in its secured transactions law or in its registry regulations. It was stated that, if a State decided to deal with registry-related issues in its registry regulations, a general provision along the lines of article 24 might be sufficient in the secured transactions law to state the principle that a security right registry should be established. While there was no disagreement with that view, the view was also expressed that the Working Group should review the articles in chapter IV and provide guidance to enacting States as to which articles might be usefully included in the secured transactions law and which articles would better fit in the registry regulations. After discussion, the Working Group agreed to proceed with its discussion of the articles in chapter IV (see para. 90 below).

#### **Article 24. The security rights registry**

65. As a matter of drafting, it was suggested that article 24 should be revised to refer to a regulation, while that term should be defined in article 2 along the following lines: “the rules dealing with the operation of the registry and the requirements for effecting a registration and conducting a search”. There was sufficient support for that suggestion. After discussion, the Working Group agreed that article 24 should be revised as suggested.

#### **Article 25. The registrar and the registry regulation**

66. The Working Group agreed to retain article 25 in its current formulation.

#### **Article 26. Authority to register an initial notice**

67. While there was broad support for the policy of article 26, a number of suggestions were made. One suggestion was that paragraph 1, on the one hand, and paragraphs 2 and 3, on the other, should be set out in separate articles. It was suggested that paragraph 1 dealt with the time of registration, while paragraphs 2 and 3 dealt with the grantor’s authorization for an initial notice. Another suggestion was that paragraph 1 should refer only to a time before or after the conclusion of the security agreement, as that reference would cover any time before or after creation of a security right. Another suggestion was that paragraph 3 should be revised to refer to “registration of an initial notice covering the assets described in the security agreement”. There was sufficient support for those suggestions.

68. Yet another suggestion was that paragraph 3 should be revised to provide that a security agreement would be sufficient to constitute authorization for the registration “unless otherwise agreed”. It was stated that a security agreement creating a security right which might be made effective against third parties by a method other than registration (for example, possession or control), would not constitute authorization for registration. That suggestion was objected to. It was observed that a general rule on party autonomy and appropriate explanations in the guide to enactment would be sufficient to address that matter.



69. After discussion, it was agreed that article 26 should be revised as suggested (see para. 67 above) and words along the following lines “unless otherwise agreed by parties” should be added within square brackets in paragraph 3 (see para. 68 above) for further consideration by the Working Group.

**Article 27. One notice sufficient for multiple security rights arising from multiple agreements between the same parties**

70. While there was broad support for the policy of article 27, it was suggested that its heading should be revised to match its contents and its text should be clarified. After discussion, the Working Group agreed that article 27 should be revised as suggested.

**Article 28. Information required in an initial notice**

71. While there was broad support in the Working Group for the policy of article 28, a number of suggestions were made as to its formulation. One suggestion was that the references in subparagraphs (a) through (c) to “satisfying the standard provided in” other articles were not necessary and should be deleted. Another suggestion was that, for reasons of consistency in the terminology used in the draft Model Law, reference should be made in subparagraph (c) to the description of an “encumbered” asset. Yet another suggestion was that subparagraph (e) should be revised to refer to “the maximum amount for which the security right may be enforced”. All those suggestions received sufficient support. While it was also suggested that subparagraph (d) should be revised to refer to “the duration” of the registration, it was agreed that for reasons of consistency with recommendation 23 of the Registry Guide the reference to “the period of effectiveness” of the registration should be retained. After discussion, the Working Group agreed that article 28 should be revised to address all those suggestions that received sufficient support.

**Article 29. Grantor identifier**

72. There was broad support in the Working Group for the policy of article 29. However, a number of suggestions were made with respect to its formulation. One suggestion was that paragraph 1 should be deleted as its thrust was addressed in article 34, paragraphs 1 and 2. Another suggestion was that the words “for the purposes of effective registration” in paragraphs 2 and 3 should be deleted and the matter discussed in the guide to enactment. Yet another suggestion was that, for reasons of consistency with the Registry Guide (rec. 24), reference should be made in the text within square brackets in paragraph 2 to the need for the enacting State to specify the various components of the grantor’s name and the designated field for each component, the official documents on the basis of which the grantor’s name should be determined and the hierarchy among those official documents, and the way in which the grantor’s name should be determined in the case of a name change after the issuance of an official document. Yet another suggestion was that paragraph 4 should be recast as a reminder to States to address those issues, while the text in paragraph 4 should be deleted and special cases should be discussed in the guide to enactment. All those suggestions received sufficient support. After discussion, the Working Group agreed that article 29 should be revised as suggested.

**Article 30. Impact of a change of the grantor’s identifier on the effectiveness of the registration**

73. While there was broad support in the Working Group for the policy of article 30, a number of suggestions were made with respect to its formulation. One suggestion was that the heading of article 30 should be revised to better reflect its contents. Another suggestion was that article 30 should be restructured to refer to a change of the grantor’s identifier and to the legal consequences of a secured creditor choosing not to register an amendment notice. Yet another suggestion was that paragraph 1 should be revised to: (a) refer to a change of the grantor’s identifier and to the fact that an inconsequential change (in view of articles 29 and 34) should not bring about the effects of article 30; and (b) treat the registration of an amendment notice as a matter left to the discretion of the secured creditor, as failure of the secured creditor to register would have the limited impact as described in paragraph 2. All those suggestions received sufficient support. After discussion, the Working Group agreed that article 30 should be revised as suggested.

**Article 31. Secured creditor identifier**

74. Broad support was expressed for the policy of article 31. After discussion, it was agreed that paragraph 3 should include only a reminder to States to address the issue dealt with therein, while the text in paragraph 3 should be moved to the guide to enactment.

**Article 32. Description of an encumbered asset covered by a notice**

75. While broad support was expressed for article 32, a number of suggestions were made as to its formulation. One suggestion was that references should be made to “the extent to which” the notice described the encumbered assets in a manner that reasonably allowed their identification, as a description could partially meet that standard, as stated in article 34, paragraph 4. Another suggestion was that no reference needed to be made to the consequences of an insufficient description, as that matter was covered in article 34, paragraph 4. There was sufficient support for those suggestions. After discussion, it was agreed that article 32 should be revised as suggested.

**Article 33. Period of effectiveness of the registration of a notice**

76. There was broad support in the Working Group for the policy of article 33. As a matter for drafting, it was suggested that the qualification of the period of five years referred to in paragraph 1 as “short” should be deleted. There was sufficient support for that suggestion. It was also suggested that direct reference to a specific time period might be made in article 33 without any qualification as to whether a time period was short or long. After discussion, the Working Group agreed that article 33 should be revised to address those suggestions that received sufficient support.

**Article 34. Consequences of an incorrect statement or insufficient description**

77. While broad support was expressed for the policy of article 34, a number of suggestions were made. One suggestion was that reference should be made in paragraph 1 to a search conducted by the registry to avoid a situation in which a searcher using more powerful software would retrieve more notices than those retrieved using the search software of the registry. Another suggestion was that paragraph 3 might be divided into two parts, while the one dealing with the description of the assets should be coordinated with paragraph 4 to ensure consistency in providing that an insufficient description of certain encumbered assets did render the registration ineffective with respect to other encumbered assets sufficiently described. Yet another suggestion was that the guide to enactment should clarify that the seriously misleading test in paragraph 3 was objective, while that test in paragraph 5 was subjective. Yet another suggestion was that the formulation of paragraph 5 might need to be reconsidered as third parties might not be misled by a longer or shorter period of effectiveness or a lower or higher maximum amount than intended, a matter that could be explained in the guide to enactment. There was sufficient support for all those suggestions. After discussion, the Working Group agreed that article 34 should be revised as suggested.

**Article 35. Authority to register an amendment or cancellation notice**

78. While broad support was expressed for the policy of article 35, a number of suggestions were made. One suggestion was that paragraph 1 should be revised to refer to the time “before or after the conclusion of the security agreement” and presented in a separate article dealing with the timing of an amendment or cancellation notice or merged with revised article 26 (see para. 67 above). Another suggestion was that subparagraph 2 (b) should be revised to refer only to an increase of the maximum amount for which the security right might be enforced and be presented in a separate article within square brackets dealing with the grantor’s authorization (see para. 67 above). Yet another suggestion was that paragraph 3 should be revised to refer to all the relevant options and presented in a separate article dealing with the secured creditor’s authorization of an amendment or cancellation notice, which raised different issues than those addressed in paragraph 2. There was support for all those suggestions. After discussion, the Working Group agreed that article 35 should be revised as suggested.

**Article 36. Information required in an amendment notice**

79. While there was broad support in the Working Group for the policy of article 36, it was suggested that subparagraph (b) did not need to refer to the manner for entering the relevant kind of information in the initial notice. It was also suggested that subparagraph (c) should be presented as paragraph 2 as the chapeau of article 36 did not fit the contents of subparagraph (c). There was sufficient support for those suggestions. After discussion, the Working Group agreed that article 36 should be revised as suggested.

**Article 37. Information required in a cancellation notice**

80. There was broad support in the Working Group for the policy of article 37. It was agreed that the term “registration number” was self-explanatory and did not need to be defined. It was suggested, however, that the terms “amendment notice” and “cancellation notice” might need to be defined in the draft Model Law. The Working Group agreed to postpone discussion of that matter until it had an opportunity to consider article 2 on definitions. After discussion, the Working Group agreed that article 37 should be retained unchanged.

**Article 38. Compulsory amendment or cancellation**

81. While there was broad support in the Working Group for the policy of article 38, a number of suggestions were made. One suggestion was that paragraph 1 should be revised to clarify when an amendment or cancellation notice ought to be registered. While the thrust of that suggestion was not objected to, the view was expressed that that matter might be better clarified in the guide to enactment. Another suggestion was that article 38 might fit better in chapter II, section II on the rights and obligations of the parties. In response, it was stated that, while the fact that the rights and obligations foreseen in article 38 were not subject to party autonomy could be addressed in chapter II, section II, the thrust of article 38 could be kept in chapter IV. Yet another suggestion was that subparagraph 1 (d) should be revised to clarify that it referred to a further commitment by the secured creditor to extend credit secured by a security right in the encumbered asset to which the notice related. Yet another suggestion was that paragraph 4 should be revised to avoid that the secured creditor might be able to charge a further fee if it did not comply with the written request of the grantor. Yet another suggestion was that paragraph 6 should be reformulated as a model legislative provision and explained in the guide to enactment. After discussion, the Working Group agreed that article 38 should be revised to address the suggestions made.

**Article 39. Time of effectiveness of the registration of an initial or amendment notice**

82. While there was broad support in the Working Group for the policy of article 39, a number of suggestions were made. One suggestion was that, in order to align the formulation of article 39 with the formulation of recommendation 11 of the Registry Guide, reference should be made to information being “accessible” (rather than “available”). Another suggestion was that a new paragraph should be added to address the time of effectiveness of a cancellation notice by reference to the time when the previously registered notice to which the cancellation notice related would no longer be accessible to searchers of the public registry record. Yet another suggestion was that new paragraphs should be added along the lines of recommendation 11, subparagraphs (b) and (c) of the draft Registry Guide (but not recommendation 15, as the obligation the registry to assign a registration number did not fit in article 39). After discussion, the Working Group agreed that article 39 should be revised as suggested.

**Article 40. Searches**

83. While there was agreement in the Working Group for the policy of article 40, a number of suggestions were made with respect to its formulation. One suggestion was that reference should be made to the fact that registry would “conduct” a search and “issue” a certificate, as the registry should be given some discretion in that regard. Another suggestion was that the need for a searcher to submit a search request in a manner prescribed in the regulation did not need to be mentioned in article 40 but could be explained in the guide to enactment.

In response to a question as to whether reference to a request was necessary in paragraph 3, it was explained that a searcher might not need a certificate and, in any case, should have to pay a required fee (no matter how low) only if the searcher requested a certificate. After discussion, the Working Group agreed that article 40 should be revised as suggested.

#### **Article 41. Errors by the registry**

84. A number of concerns were expressed with respect to article 41. One concern was that inclusion in the draft Model Law of a provision along the lines of article 41 might inadvertently give the impression that the draft Model Law promoted a paper-based registry, while it should promote an electronic registry. In order to address that concern it was suggested that the thrust of article 41 should rather be discussed in the guide to enactment. It was noted, however, that, as agreed, the Working Group should complete its review of the provisions of chapter IV and decide at a later time whether and where those provisions should be included (see para. 64 above). Another concern was that article 41 left it to the discretion of the registry to correct an error it had made, without clarifying the conditions under which the registry could exercise that discretion. In order to address that concern, it was suggested that article 41 should be recast to provide for an obligation of the registry to correct errors it had made. There was sufficient support for that suggestion on the understanding that a breach of such an obligation did not necessarily result in liability for the registry.

85. Yet another concern was that article 41 was incomplete as to the point of time as of which the correction would take effect. In order to address that concern, it was suggested that all the possible approaches should be set out as alternatives, including the following: (a) the correction would take effect as of the time it was made; (b) the correction would take effect as of the time it was made, subject however to the rights of parties that had registered a notice after the registration of the erroneous notice and before its correction; (c) the correction would take effect retroactively (i.e., as of the time the erroneous notice was registered); and (d) the registry would inform, and leave it to, the registrant to make the correction (see Registry Guide, para. 145). There was sufficient support for that suggestion. After discussion, the Working Group agreed that article 41 should be revised to address those of the suggestions that received sufficient support.

#### **Article 42. Responsibility for loss or damage**

86. A number of concerns were expressed with respect to article 42. One concern was that article 42 was inconsistent with the Secured Transactions Guide (rec. 56) and the Registry Guide (paras. 150-153). It was stated that States took different approaches to the issue of liability of the registry ranging from exemption from liability based on sovereign immunity to limited liability covered by insurance or funds to which part of the registry fees were deposited. In order to address that concern, it was suggested that the options in article 42 should be preceded by a reference to any liability the registry might have under other law of the enacting State and be recast so as to limit any liability, in the case of an electronic registry, to system malfunction (as the registrant should be responsible for any errors in a notice registered without the intervention of the registry) and, in the case of a paper-based registry, to errors or omissions by the registry in the entry of information in the registry record. The latter part of that suggestion was objected to. It was stated that it was inconsistent with the Secured Transactions Guide (rec. 56) and should not be included in article 42. Yet another concern was that using different terms (“responsibility” and “liability”) was confusing. In order to address that concern, it was suggested that the relevant terminology should be explained and used consistently. All those suggestions received sufficient support. After discussion, it was agreed that article 42 should be revised to address those suggestions and placed within square brackets for further consideration by the Working Group.

#### **Article 43. General registry operation provisions**

87. Noting that article 43 dealt with matters relating to the operation of the registry, the Working Group recalled its decision to review the provisions of chapter IV and defer to a later stage a decision as to whether those provisions should be retained in the draft Model Law or discussed in the guide to enactment as matters to be dealt in the registry regulation (see para. 64 above). With respect to paragraph 1, it was widely felt that it could be discussed

in the guide to enactment. With respect to paragraph 2, it was stated that it could be retained if it were revised to deal with the legal effect of the failure of a registrant to submit a notice in the manner prescribed by the registry. With respect to paragraphs 3 and 4, it was agreed that they should be retained within square brackets for further consideration by the Working Group. With respect to paragraph 5, it was generally agreed that it should be retained in a separate article that would need to be coordinated with articles 41 and 42, as well as with the provision dealing with amendment and cancellation notices that were not authorized by the secured creditor. It was also suggested that the new article would need to address the question as to who was entitled to submit an amendment notice when there was a change in the secured creditor. With respect to paragraph 6, it was suggested that the issues addressed therein should rather be discussed only in the guide to enactment by reference to the Registry Guide. With respect to paragraph 7, it was agreed that it should be retained. After discussion, the Working Group agreed that article 43 should be recast to address all those suggestions for further consideration by the Working Group.

#### **Article 44. Registry forms**

88. After discussion, it was agreed that article 44 should be deleted from the draft Model Law and discussed in the guide to enactment by way of reference to the relevant parts of the Registry Guide.

#### **Article 45. Impact of a transfer of an encumbered asset on the effectiveness of the registration**

89. A number of suggestions were made with respect to article 45, including that: (a) it should be revised to leave the registration of an amendment notice to the discretion of the secured creditor and to clarify the effects of its application to outright sales of receivables; and (b) it should be placed closer to article 30. After discussion, the Working Group agreed that article 45 should be revised as suggested.

90. At the close of the discussion of chapter IV by the Working Group, a suggestion was made that the problem of the proper place and contents of chapter IV (see para. 64 above) would be easier to resolve if the Working Group were to prepare both a draft model law and draft registry regulations. It was stated that in that way comprehensive guidance would be offered to States consistent with the Secured Transactions Guide and the Registry Guide. While support was expressed for that suggestion, it was observed that it would be premature for the Working Group to make a recommendation that the Commission give such a broader mandate to the Working Group. However, the Secretariat was requested to include in chapter IV additional provisions from the Registry Guide, while keeping in mind the Working Group's mandate to prepare a simple, short and concise model law.

### **G. Chapter V. Priority of a security right (A/CN.9/WG.VI/WP.57/Add.2)**

#### **Article 46. Priority among security rights granted by the same grantor in the same encumbered asset**

91. A number of suggestions were made with respect to article 46, including that: (a) paragraph 2 should be placed within square brackets and coordinated with article 20; and (b) paragraphs 2 through 4 should be placed within individual square brackets for further consideration by the Working Group.

#### **Article 47. Priority of rights of transferees, lessees and licensees of an encumbered asset**

92. A number of suggestions were made with respect to article 47, including that it should be revised to ensure consistent use of terminology and address in paragraph 7 the rights of parties that acquired a right in an encumbered asset not only from the buyer but also from subsequent transferees.

**Article 48. Priority of rights of the grantor's insolvency representative [and creditors in the grantor's insolvency]**

93. A number of suggestions were made with respect to article 48, including that it should be placed within square brackets for further consideration by the Working Group.

**Article 49. Priority of preferential claims**

94. A number of suggestions were made with respect to article 49, including that it should be aligned more closely with recommendation 83 of the Secured Transactions Guide, on which it was based, and that the guide to enactment should clarify the terminology used.

**Article 50. Priority of rights of judgement creditors**

95. A number of suggestions were made with respect to article 50, including that: (a) its heading should be revised to more closely match its content; (b) its text should be revised to clarify the temporal sequence of events and to ensure the consistent use of terminology.

**Article 51. Irrelevance of knowledge of the existence of a security right**

96. A number of suggestions were made, including that article 51 should be made subject to rules with respect to a protected holder of a negotiable instrument (see article 92, para. 2 (a)).

**Article 52. Subordination**

97. A number of suggestions were made with respect to article 52, including that the guide to enactment should refer to the discussion of subordination in the Secured Transactions Guide and explain by way of examples how any circular priority problems might be addressed.

**Article 54. Priority of a security right registered in a specialized registry or noted on a title certificate**

98. A number of suggestions were made with respect to article 54, including that the reference to notation of title should be preserved and paragraph 3 should be further clarified.

**Article 55. Special priority claims**

99. A number of suggestions were made with respect to article 55, including that paragraph 1 should be addressed in the context of article 49 on preferential claims and paragraphs 2 and 3 should be retained within square brackets.

100. After discussion, the Working Group agreed that articles 46-55 should be revised as suggested (see paras. 91-99 above).

**H. Chapter VI. Enforcement of a security right  
(A/CN.9/WG.VI/WP.57/Add.2)****Article 56. General Standard of conduct in the context of enforcement and****Article 57. Limitation on party autonomy**

101. A number of suggestions were made with respect to articles 56 and 57, including that article 56 and paragraph 1 of article 57 should be placed in the general provisions of the draft Model Law, and paragraph 2 of article 57 should be retained in chapter VI (see paras. 19, 20 and 43 above).

**Article 58. Liability**

102. Differing views were expressed as to whether article 58 should be retained. It was agreed that, for the time being, it should be retained within square brackets for further consideration by the Working Group.

103. After discussion, the Working Group agreed that articles 56-58 should be revised as suggested (see paras. 101-102 above).

**B. Note by the Secretariat on a Draft Model Law on Secured Transactions****(A/CN.9/WG.VI/WP.57 and Add.1-4)****[Original: English]****Contents***Page*

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**Preamble**

The purpose of this Law is:

- (a) To promote low-cost credit by enhancing the availability of secured credit;
- (b) To allow grantors to use the full value inherent in their assets to support credit;

- (c) To enable secured creditors to obtain security rights in a simple and efficient manner;
- (d) To provide for equal treatment of diverse sources of credit and of diverse forms of secured transactions;
- (e) To validate non-possessory security rights in all types of asset;
- (f) To enhance certainty and transparency by generally providing for registration of a notice of a security right in a general security rights registry;
- (g) To establish clear and predictable priority rules;
- (h) To facilitate efficient enforcement of a creditor's rights;
- (i) To allow parties maximum flexibility to negotiate the terms of their security agreement;
- (j) To balance the interests of all affected persons; and
- (k) To harmonize laws, including conflict-of-laws rules, relating to secured transactions.

*[Note to the Working Group: The Working Group may wish to consider whether a commentary (or guide to enactment) to the draft Model Law (if the Working Group decides that one should be prepared) should, in line with the mandate given to the Working Group by the Commission (see A/67/17, para. 105), clarify that the draft Model Law is intended to be a simple, short and concise model law based on the recommendations of the UNCITRAL Legislative Guide on Secured Transactions (the "Secured Transactions Guide"), and consistent with all texts prepared by UNCITRAL on secured transactions.]*

## **Chapter I. Scope of application and general provisions**

### **Article 1. Scope of application**

1. Subject to paragraph 3 of this article, this Law applies to all rights in movable assets created by agreement that secure payment or other performance of an obligation, regardless of the form of the transaction or the terminology used by the parties, the type of the movable asset, the status of the grantor or secured creditor or the nature of the secured obligation, including:

(a) Security rights in all types of movable asset, tangible or intangible, present or future, including inventory, equipment and other tangible assets, contractual and non-contractual receivables, and contractual non-monetary claims;

(b) Security rights created or acquired by all legal and natural persons, including consumers, without, however, affecting rights under consumer-protection law;

(c) Security rights securing all types of obligation, present or future, determined or determinable, including fluctuating obligations and obligations described in a generic way; and

(d) All property rights created contractually to secure the payment or other performance of an obligation, including transfers of title to tangible assets for security purposes or assignments of receivables for security purposes, the various forms of retention-of-title sales and financial leases.

2. Subject to the exception provided in chapter VII, section I of this Law with respect to the enforcement of outright transfers of receivables, this Law also applies to outright transfers of receivables despite the fact that such transfers do not secure the payment or other performance of an obligation.

3. Notwithstanding paragraphs 1 and 2 of this article, this Law does not apply to the following types of movable asset:

- (a) Rights to receive the proceeds under an independent undertaking;



(b) Aircraft, railway rolling stock, space objects, ships as well as other categories of mobile equipment in so far as such asset is covered by other law and the matters covered by this Law are addressed in that other law;

[(c) Intellectual property in so far as this Law is inconsistent with law relating to intellectual property];<sup>1</sup>

(d) [Intermediated] securities;

(e) Payment rights arising under or from financial contracts governed by netting agreements, except a receivable owed on the termination of all outstanding transactions;

(f) Payment rights arising under or from foreign exchange transactions;

(g) Proceeds of an excluded type of asset even if the proceeds are of a type of asset to which this Law applies, but only to the extent that other law applies; and

(h) [...].<sup>2</sup>

*[Note to the Working Group: The Working Group may wish to note that the functional and comprehensive approach recommended in the Secured Transactions Guide would be undermined if assets used as security in key commercial finance transactions were excluded. In essence, such exclusions would create obstacles to commercial finance practices as one law would apply, for example, to inventory, and another law to receivables from the sale of the inventory or to bank accounts in which the funds received were deposited. In this connection, the Working Group may wish to consider whether: (a) rights to receive the proceeds under an independent undertaking may be excluded from the scope of the draft Model Law as they are not an indispensable part of a typical commercial finance transaction; (b) the exclusion of intellectual property rights could be retained within square brackets until the Working Group had the opportunity to complete its first reading of the draft Model Law; (c) the exclusion of securities should be limited to intermediated securities covered in other law but not to non-intermediated securities that are typically part of commercial financing transactions, and if so, consider the additional rules that would be required; and (d) proceeds of inventory in the form of land should be covered and, if so, consider the additional rules that would be required. The Working Group may also wish to note that, with respect to subparagraphs 3(b) and (c) of this article, the commentary will clarify that “other law” and “law relating to intellectual property” may mean a national law or an international agreement to which the State enacting the draft Model Law (the enacting State”) is a party.]*

## Article 2. Definitions

For the purposes of this Law:

*[Note to the Working Group: The Working Group may wish to note that the definitions of the terms “acquisition secured creditor” and “acquisition security right”, “financial lease right” and “retention-of-title right” have been moved to Annex I on acquisition financing. The Working Group may also wish to note that the references to the unitary and non-unitary approach to secured transactions in the relevant definitions have been deleted as they do not fit in a model law and have been included in Annex I on acquisition financing. The Working Group may also wish to note that, if the Working Group decides that security rights in intellectual property should be covered in the draft Model Law, it may wish to consider whether the definitions included in the Supplement on Security Rights in Intellectual Property (the “Intellectual Property Supplement”) should be added to article 2.]*

(a) “Assignee” means a person to which an assignment of a receivable is made;

(b) “Assignment” means the creation of a security right in a receivable that secures the payment or other performance of an obligation. The term also includes for convenience of reference an outright transfer of a receivable;

(c) “Assignor” means a person that makes an assignment of a receivable;

<sup>1</sup> The enacting State will have to adjust this provision to fit its intellectual property law.

<sup>2</sup> If the enacting State decides to introduce any other exception(s), they should be limited and set out in a clear and specific way.

(d) “Bank account” means an account maintained by a bank, to which funds may be credited. The term includes a checking or other current account, as well as a savings or time deposit account. The term does not include a right against the bank to payment evidenced by a negotiable instrument;

*[Note to the Working Group: The Working Group may wish to note that the definitions of the terms “attachment to a movable asset” and “attachment to immovable property”, as well as the relevant recommendations have been deleted in the interest of addressing in the draft Model Law key issues and referring for the rest to the recommendations of the Secured Transactions Guide. The Working Group may also wish to note that the definitions of terms such as “insolvency court”, “insolvency estate” and “insolvency proceedings”, and the insolvency chapter of the Secured Transactions Guide, have been deleted, as insolvency matters, including definitions, would normally be addressed in insolvency law.]*

(e) “Competing claimant” means a creditor of a grantor that is competing with respect to an encumbered asset with another creditor of the grantor having a security right in the encumbered asset of the grantor and includes:

- (i) Another creditor with a security right in the same encumbered asset (whether as an original encumbered asset or proceeds);
- (ii) The [enacting State to determine whether reference should be made to an acquisition secured creditor only or also to a seller or financial lessor] of the same encumbered asset that has retained title to it;
- (iii) Another creditor of the grantor that has a right in the same encumbered asset;
- (iv) The insolvency representative [and creditors] in the insolvency proceedings in respect of the grantor; or
- (v) Any buyer or other transferee (including a lessee or licensee) of the encumbered asset;

*[Note to the Working Group: The Working Group may wish to consider whether the bracketed text in subparagraph (iv) should be retained, as in some jurisdictions the estate is represented by the insolvency representative, while in other jurisdictions the estate is represented by the mass of creditors (see article 14, para. 1 of the UNIDROIT Convention on Substantive Rules for Intermediated Securities (Geneva, 2009, the “Geneva Securities Convention”).]*

(f) “Consumer goods” means tangible assets that a person uses or intends to use for personal, family or household purposes;

(g) “Debtor” means a person that owes payment or other performance of a secured obligation and includes a secondary obligor such as a guarantor of a secured obligation. The term includes for convenience of reference an assignor in an outright transfer of a receivable. The debtor may or may not necessarily be the grantor;

(h) “Debtor of the receivable” means a person liable for payment of a receivable and includes a guarantor or other person secondarily liable for payment of the receivable;

(i) “Encumbered asset” means a movable, tangible or intangible, asset that is subject to a security right. The term also includes for convenience of reference a receivable that has been the subject of an outright transfer;

(j) “Equipment” means a tangible asset used by a person in the operation of its business;

(k) “Future asset” means a movable asset, which does not exist or which the grantor does not own or have the power to encumber, at the time the security agreement is concluded;

(l) “Grantor” means a person that creates a security right to secure either its own obligation or that of another person, including [the enacting State to determine whether reference should be made also to a retention-of-title buyer and financial lessee]. The term also includes an assignor in an outright transfer of a receivable;

(m) “Insolvency representative” means a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or the liquidation of the insolvency estate;

(n) “Intangible asset” means all forms of movable assets other than tangible assets and includes incorporeal rights, receivables and rights to the performance of obligations other than receivables;

(o) “Inventory” means tangible assets held for sale or lease in the ordinary course of a grantor’s business, as well as raw and semi-processed materials (work-in-process);

(p) “Knowledge” means actual rather than constructive knowledge;

(q) “Notice” means a communication in writing;

*[Note to the Working Group: The Working Group may wish to note that the commentary will refer to article 4 for the electronic equivalent of “writing” and “signed writing” and also to the term “notice” in the draft Registry Guide. The Working Group may also wish to consider whether a new term (e.g. “registration notice” or “security right notice” should be introduced and the term notice should be amended to refer to other types of notice (e.g., given in the context of enforcement).]*

(r) “Notification of the assignment” means a notice that reasonably identifies the assigned receivable and the assignee;

*[Note to the Working Group: The Working Group may wish to consider this definition states a substantive rule on the effectiveness of a notification of the assignment that is already addressed in article 82, paragraph 1.]*

(s) “Original contract” means, in the context of a receivable created by contract, the contract between the creditor and the debtor of the receivable from which the receivable arises;

(t) “Possession” means the actual possession only of a tangible asset by a person or an agent or employee of that person, or by an independent person that acknowledges holding it for that person. It does not include non-actual possession described by terms such as constructive, fictive, deemed or symbolic possession;

(u) “Priority” means the right of a person to derive the economic benefit of its security right in preference to a competing claimant;

(v) “Proceeds” means whatever is received in respect of encumbered assets, including what is received as a result of sale or other disposition or collection, lease or licence of an encumbered asset, proceeds of proceeds, civil and natural fruits, dividends, distributions, insurance proceeds and claims arising from defects in, damage to or loss of an encumbered asset;

(w) “Receivable” means a right to payment of a monetary obligation, excluding a right to payment evidenced by a negotiable instrument, a right to receive the proceeds under an independent undertaking and a right to payment of funds credited to a bank account;

(x) “Right to receive the proceeds under an independent undertaking” means the right to receive a payment due, a draft accepted or deferred payment incurred or another item of value, in each case to be paid or delivered by the guarantor/issuer, confirmer or nominated person giving value for a draw under an independent undertaking. The term also includes the right to receive payment in connection with the purchase by a negotiating bank of a negotiable instrument or a document under a complying presentation. The term does not include:

(i) The right to draw under an independent undertaking; or

(ii) What is received upon honour of an independent undertaking;

(y) “Secured creditor” means a creditor that has a security right. The term also includes for convenience of reference an assignee in an outright transfer of a receivable;

(z) “Secured obligation” means an obligation secured by a security right;

(aa) “Secured transaction” means a transaction that creates a security right, including for convenience of reference an outright transfer of a receivable, without re-characterizing it as a secured transaction;

(bb) “Security agreement” means an agreement, in whatever form or terminology, between a grantor and a secured creditor that creates a security right. The term also includes for convenience of reference an agreement for the outright transfer of a receivable;

(cc) “Security right” means a property right in a movable asset that is created by agreement and secures payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right; and

(dd) “Tangible asset” means every form of corporeal movable asset, such as consumer goods, inventory and equipment.

### Article 3. Party autonomy

1. Except as otherwise provided in this Law, the secured creditor and the grantor or the debtor may derogate from or vary by agreement its provisions relating to their respective rights and obligations.

2. Such an agreement does not affect the rights of any person that is not a party to the agreement.

*[Note to the Working Group: The Working Group may wish to note that the commentary will refer to the articles of the Law which are not subject to party autonomy.]*

### Article 4. Electronic communications

1. Where this Law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.

2. Where this Law requires that a communication or a contract should be signed by a person, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:

(a) A method is used to identify the person and to indicate that person’s intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph 2 (a) of this article, by itself or together with further evidence.

*[Note to the Working Group: The Working Group may wish to note that, with respect to the substance of article 4, the commentary will refer to article 9, paragraphs 2 and 3, of the United Nations Convention on the Use of Electronic Communications in International Contracts. The Working Group may wish to consider whether this article should be retained or deleted, while the matter addressed therein left to the law of the enacting State or dealt with in the definitions. In deciding whether to retain or delete this article, the Working Group may wish to note that the draft Model Law does not require that a communication or a contract be signed.]*

## Chapter II. Creation of a security right and rights and obligations of the parties

### Section I. Creation of a security right

#### Article 5. Creation of a security right

1. Except as otherwise provided in other law, a security right in a movable asset is created by a security agreement.
2. Such a security right is effective between the grantor and the secured creditor [and against third parties only as provided in chapter III].
- [3. In the case of a movable asset with respect to which the grantor has rights or the power to encumber at the time of the conclusion of the security agreement, the security right in that asset is created at that time.
4. In the case of a movable asset with respect to which the grantor acquires rights or the power to encumber after the security agreement is entered into, the security right in that asset is created when the grantor acquires rights in the asset or the power to encumber the asset.]

*[Note to the Working Group: The Working Group may wish to consider whether paragraphs 3 and 4 of this article should be placed in a separate article that should follow perhaps article 10.]*

#### Article 6. Minimum content of a security agreement

A security agreement must:

- (a) Reflect the intent of the parties to create a [a limited right in property] [a right subject to this Law] [security right];
- (b) Identify the secured creditor and the grantor;
- (c) Describe the secured obligation, if any;
- (d) Describe the encumbered assets in a manner that reasonably allows their identification[; and
- (e) Indicate the maximum monetary amount for which the security right may be enforced, if any].<sup>3</sup>

*[Note to the Working Group: The Working Group may wish to consider whether subparagraph (a) should be deleted. The intent of the parties is a matter of contract law and, in any case, is covered in the definition of the security agreement. In addition, subparagraph (a) may be misconstrued and, for example, make it more difficult for a court to re-characterize a title transaction that, irrespective of what the parties intended, objectively serves security purposes. If the Working Group decides to retain subparagraph (a), it may wish to consider revising it along the lines of the alternatives contained in subparagraph (a) within square brackets. The Working Group may also wish to note that the commentary will explain, inter alia, that the words "if any" in subparagraph (c) have been added as the draft Model Law applies to sales of receivables in which there is no secured obligation as such.]*

#### Article 7. Form of a security agreement

1. Subject to paragraph 2 of this article, the security agreement must be concluded in or evidenced by a writing that, by itself or in conjunction with the course of conduct between the parties, indicates the grantor's intent to create a security right.
2. A security agreement may be oral if accompanied by the secured creditor's possession of the encumbered asset.

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<sup>3</sup> If the enacting State determines that an indication would be helpful in order to facilitate lending from another creditor.

*[Note to the Working Group: The Working Group may wish to consider whether paragraph 1 of this article is inconsistent with article 6 subparagraph (a), which requires that the security agreement reflect the intent of the parties.]*

### **Article 8. Obligations secured by a security right**

A security right may secure any type of obligation, whether present or future, determined or determinable, conditional or unconditional, fixed or fluctuating.

*[Note to the Working Group: The Working Group may wish to consider whether: (a) this article should be closely integrated with article 6, subparagraph (c); and (b) whether reference should be made in this article to “legally enforceable obligations” or in the commentary to contract or other law.]*

### **Article 9. Assets subject to a security right**

1. With the exception of [any limited and specific exceptions to be set out by the enacting State], a security right may encumber any type of asset, including:

- (a) Parts of assets and undivided rights in assets;
- (b) Future assets; and
- (c) All assets of a grantor.

2. Except as provided in articles 76 and 77, this Law does not [address what type of asset may be transferred or encumbered] override provisions of any other law to the extent that they limit the creation or enforcement of a security right in, or the transferability of, specific types of asset.

*[Note to the Working Group: The Working Group may wish to note that the commentary will clarify that the exceptions meant in paragraph 1 of this article do not refer to assets that are outside the scope of the draft Model Law but rather assets that, based on mandatory law, may not be encumbered at all (e.g. employment benefits). The Working Group may also wish to consider whether subparagraph (c) and paragraph 2 of this article address matters that are so different from the matters addressed in subparagraphs (a) and (b) that should be addressed in a separate article and/or in the definitions. Wherever paragraph 2 is placed, the Working Group may wish to consider the alternative text contained therein within square brackets.]*

### **Article 10. Continuation of a security right in proceeds**

1. A security right in an encumbered asset extends to its identifiable proceeds, including proceeds of proceeds.

2. Where proceeds have been commingled with other assets of the same kind so that the proceeds are no longer identifiable, the amount of the proceeds immediately before they were commingled is nevertheless to be treated as identifiable proceeds after commingling.

3. If, at any time after commingling, the total amount of the asset is less than the amount of the proceeds, the total amount of the asset at the time that its amount is lowest plus the amount of any proceeds later commingled with the asset is to be treated as identifiable proceeds.

*[Note to the Working Group: The Working Group may wish to note that the commentary will clarify that this is a default rule applicable in the absence of contrary agreement of the parties as long as rights of third parties are not affected (see article 3, para. 1). The Working Group may also wish to consider whether paragraphs 2 and 3 (dealing with commingled proceeds) should be set out in a separate article. The Working Group may also wish to note the draft Model Law does not explicitly address the creation and continuation of a security right in attachments or in masses or products. The commentary may explain that attachments to movable assets are generally covered and that, if States wish to cover also attachments to immovable property, they may wish to consider implementing the relevant recommendations of the Secured Transactions Guide (same approach for masses or products). The Working Group may also wish to note that the generic description of encumbered assets has been covered in article 6, subparagraph (d),*

and, a result, article 13 (of document A/CN.9/WG.VI/WP.55/Add.1 (dealing with bulk assignments of receivables), has been deleted.).

## **Section II. Rights and obligations of the parties to a security agreement**

### **Article 11. Rights and obligations of the parties**

The mutual rights and obligations of the parties are determined by:

- (a) The terms and conditions set forth in the security agreement, including any rules or general conditions referred to therein;
- (b) Any usage to which the parties to the security agreement have agreed; and
- (c) Unless otherwise agreed, any practices the parties to the security agreement have established between themselves.

### **Article 12. Mandatory rules**

1. The party in possession of an encumbered asset must take reasonable steps to preserve the asset and its value.
2. The secured creditor must return an encumbered asset in its possession if, all commitments to extend credit have been terminated and the security right has been extinguished by full payment or otherwise.

*[Note to the Working Group: The Working Group may wish to note that article 38 contained in A.CN.9/WG.VI/WP.57/Add.1 deals with the secured creditor's duty to register a cancellation notice, and consider whether that matter should be addressed instead in article 12 or also in article 12.]*

### **Article 13. Non-mandatory rules**

Unless otherwise agreed, the secured creditor is entitled:

- (a) To be reimbursed for reasonable expenses incurred for the preservation of an encumbered asset in its possession;
- (b) To make reasonable use of an encumbered asset in its possession and to apply the revenues it generates to the payment of the secured obligation; and
- (c) To inspect an encumbered asset in the possession of the grantor.

*[Note to the Working Group: The Working Group may wish to consider whether this and any other non-mandatory rules should be included in the draft Model Law or left to the parties and contract law, and discussed in the commentary.]*

## **Chapter III. Effectiveness of a security right against third parties**

### **Article 14. Achieving third-party effectiveness**

1. A security right that is effective as between the grantor and the secured creditor is also effective against third parties, but only insofar as provided in this chapter.
2. A security right that is effective against third parties is effective against the insolvency representative [and creditors in any insolvency proceeding].
3. Paragraph 2 of this article does not affect the application of any substantive or procedural rule of law applicable by virtue of an insolvency proceeding, such as any rule relating to:
  - (a) The ranking of categories of claims;
  - (b) The avoidance of a transaction as a preference or a transfer in fraud of creditors; or
  - (c) The enforcement of rights to property that is under the control or supervision of the insolvency representative.

*[Note to the Working Group: The Working Group may wish to note that the commentary will explain that third-party effectiveness of a security right pre-supposes effective creation and completion of a third-party effectiveness step. The Working Group may also wish to consider whether paragraphs 2 and 3 of this article, which address the key issue of the effectiveness of a security right in insolvency and are based on article 14 of the UNIDROIT Geneva Securities Convention, should be retained. The Working Group may also wish to consider whether the term “third party” should be defined and include, in any case, the grantor’s insolvency representative and the creditors in insolvency.]*

**Article 15. General method for achieving third-party effectiveness: registration**

1. A security right is effective against third parties:
  - (a) If a notice with respect to the security right is registered in the general security rights registry as provided in chapter IV; or
  - (b) As otherwise provided in this chapter.
2. Registration of a notice does not create a security right and is not necessary for the creation of a security right.

*[Note to the Working Group: The Working Group may wish to consider whether paragraph 2 of this article should be deleted and the matter addressed therein explained in the commentary.]*

**Article 16. Different third-party effectiveness methods for different types of asset**

Different methods for achieving third-party effectiveness may be used for different types of encumbered asset, whether they are encumbered pursuant to the same security agreement or not.

*[Note to the Working Group: The Working Group may wish to consider whether this article should be deleted and the matter addressed therein explained in the commentary.]*

**Article 17. Third-party effectiveness of a security right in a tangible asset by possession**

A security right in a tangible asset may be made effective against third parties by registration of a notice in the general security rights registry or by the secured creditor’s possession.

**Article 18. Third-party effectiveness of a security right in a movable asset subject to a specialized registration or a title certificate system**

A security right in a movable asset that is subject to registration in a specialized registry or notation on a title certificate under other law may be made effective against third parties by registration in the general security rights registry or by:

- (a) Registration in the specialized registry; or
- (b) Notation on the title certificate.

*[Note to the Working Group: The Working Group may wish to consider whether it is enough to refer in this article to “specialized registration” and leave it to States to determine the exact scope of this term. In such a case, it would be up to each enacting Stat to determine whether registration in a specialized registry only or also notation on a title certificate should be covered, a matter that may be explained in the commentary. The Working Group may also wish to note that the commentary will explain that possession and specialized registration are methods of third-party effectiveness in addition to registration.]*



### **Article 19. Automatic third-party effectiveness of a security right in proceeds**

1. If a security right in an encumbered asset is effective against third parties, a security right in any proceeds of the encumbered asset (including any proceeds of proceeds) is effective against third parties when the proceeds arise, provided that the proceeds are described in a generic way in a registered notice or that the proceeds consist of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account.
2. If the security right in proceeds is not effective against third parties as provided in paragraph 1 of this article, the security right in the proceeds continues to be effective against third parties for [a short period of time to be specified by the enacting State] days after the proceeds arise.
3. If the security right in such proceeds is made effective against third parties by one of the methods referred to in this chapter before the expiry of the time period provided in paragraph 2 of this article, the security right in the proceeds continues to be effective against third parties thereafter.

### **Article 20. Continuity in third-party effectiveness of a security right upon change of method of third-party effectiveness**

Third-party effectiveness of a security right continues notwithstanding a change in the method by which it is made effective against third parties, provided that there is no time when the security right is not effective against third parties.

### **Article 21. Lapse in third-party effectiveness or advance registration**

If a security right has been made effective against third parties and subsequently there is a period during which the security right is not effective against third parties or if registration made before the creation of a security right or the conclusion of a security agreement expires, third-party effectiveness may be re-established [, but is effective only from the time when the new registration of a notice with respect to the security right becomes effective].

*[Note to the Working Group: The Working Group may wish to consider whether: (a) the bracketed part of this article is already covered in the part that is not within square brackets; (b) whether this article sets out a priority rule that should be included in the priority chapter.]*

### **Article 22. Effect of a transfer of the encumbered asset**

Except as otherwise provided in this Law, a security right does not become ineffective as between the parties or as against third parties solely because the encumbered asset is transferred.

*[Note to the Working Group: The Working Group may wish to note that article 22 has been added to reflect a generally acceptable principle of secured transactions law.]*

### **Article 23. Continuity in third-party effectiveness upon change of the governing law**

If the third-party effectiveness of a security right was governed by the law of another State, and the law of this State becomes the governing law, the following rules apply:

- (a) The security right continues to be effective against third parties under the law of this State for [a short period of time to be specified by the enacting State] days after the change;
- (b) The security right continues to be effective against third parties after the end of that period under the law of this State, if the third-party effectiveness requirements of this law are satisfied prior to the end of that period; and

(c) If the security right continues to be effective against third parties under subparagraph (a) and (b), the time when registration or third-party effectiveness was achieved for the purposes of the articles on priority is the time when it was achieved under the law of the other State.

*[Note to the Working Group: The Working Group may wish to note that this article is intended to reflect recommendation 45 of the Secured Transactions Guide and consider the drafting changes made.]*

## (A/CN.9/WG.VI/WP.57/Add.1) (Original: English)

**Note by the Secretariat on a Draft Model Law on Secured Transactions****ADDENDUM****Contents**

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**Chapter IV. The registry system**

*[Note to the Working Group: In considering the structure and the content of chapter IV, the Working Group may wish to note that it has been revised to reflect the thrust of the relevant recommendations of both the Secured Transactions Guide and the Registry Guide in a way that would fit a model law.]*

**Article 24. The security rights registry**

1. The security rights registry is established under [the enacting State to specify the relevant act] for registration of notices with respect to security rights in accordance with this Law and the administrative rules dealing with the operation of the registry and the requirements for effecting a registration and conducting a search (the "Regulation").
2. The security rights registry is open to the public in accordance with this Law and the Regulation.

*[Note to the Working Group: The Working Group may wish to note that the commentary will explain that the registry may be established in different ways (e.g. by law, ministerial decree or other act).]*

#### **Article 25. The registrar and the registry regulation**

The [enacting State to insert a person or entity] is authorized to:

- (a) Appoint the registrar and determine the registrar's duties; and
- (b) Enact the Regulation.

#### **Article 26. Authority to register an initial notice**

1. The secured creditor may register an initial notice with respect to a security right, before or after the creation of the security right or the conclusion of the security agreement.
2. Registration of an initial notice is ineffective unless authorized by the grantor in writing, before or after registration.
3. A written security agreement is sufficient to constitute authorization for the registration.

#### **[Article 27. One notice sufficient for multiple security rights arising from multiple agreements between the same parties]**

The registration of a single notice is sufficient to achieve third-party effectiveness of one or more than one security right in the encumbered asset described in the notice, whether they exist at the time of registration or are created thereafter, and whether they arise from one or more than one security agreement between the same parties.]

*[Note to the Working Group: The Working Group may wish to consider whether this article should be moved to the third-party effectiveness chapter.]*

#### **Article 28. Information required in an initial notice**

An initial notice must contain the following information in the designated field:

- (a) The identifier of the grantor, satisfying the standard provided in article 29, the address of the grantor [and any other information to be specified by the enacting State to assist in uniquely identifying the grantor];
- (b) The identifier of the secured creditor or its representative, satisfying the standard provided in article 31, and their addresses; [and]
- (c) A description of the asset covered by the notice, satisfying the standard provided in article 32;
- (d) The period of effectiveness of the registration;<sup>4</sup> and
- (e) A statement of that maximum amount].<sup>5</sup>

*[Note to the Working Group: The Working Group may wish to note that the reference to additional information in the notice to assist in uniquely identifying the grantor has been added in subparagraph (a) and deleted from article 29, paragraph 2. These changes are intended to reflect decisions of the Working Group with respect to recommendation 23, subparagraph (a) (i), of the Registry Guide so as to avoid making the additional information part of the grantor's identifier and thus a search criterion.]*

#### **Article 29. Grantor identifier**

1. The registration of an initial notice, or an amendment notice that amends the grantor's identifier or adds a grantor, is effective if the notice provides the grantor's correct identifier

<sup>4</sup> This provision will be necessary, if the enacting State implements option B or C of article 33.

<sup>5</sup> This provision will be necessary, if the enacting State determines that an indication in the notice of the maximum monetary amount for which the security right may be enforced would be helpful in order to facilitate lending from another creditor.

in accordance with paragraphs 2 and 3 of this article, or, in the case of an incorrect statement, as provided in article 34, paragraphs 1 and 2.

2. Where the grantor is a natural person, the identifier of the grantor for the purposes of effective registration is the grantor's name, as it appears in [an official document to be specified by the enacting State].

3. Where the grantor is a legal person, the grantor's identifier for the purposes of effective registration is the name that appears in the most recent [document, law or decree to be specified by the enacting State] constituting the legal person.

[4. Where the grantor falls within a special case, such as a person that is subject to insolvency proceedings and a trustee or representative of an estate, the enacting State should specify the grantor identifier.]

*[Note to the Working Group: The Working Group may wish to note that the changes to paragraphs 1, 2 and 3 of this article (compared with recommendations 58-60 of the Secured Transactions Guide on which they are based) are intended to align them respectively with recommendations 29, 23, subparagraph (a) (i), and 25 of the Registry Guide.]*

### **Article 30. Impact of a change of the grantor's identifier on the effectiveness of the registration**

1. If, after an initial or amendment notice is registered, the identifier of the grantor changes and as a result the grantor's identifier set forth in the notice does not meet the standard provided in article 29, the secured creditor [may] [must] register an amendment notice providing the new identifier in compliance with that standard.

2. If the secured creditor does not register the amendment within [a short period of time, such as thirty days, to be specified by the enacting State] after the change, the security right is ineffective against:

(a) A competing security right with respect to which a notice is registered or which is otherwise made effective against third parties after the change in the grantor's identifier but before registration of the amendment notice; and

(b) A person that buys, leases or licenses the encumbered asset after the change in the grantor's identifier but before registration of the amendment notice.

*[Note to the Working Group: The Working Group may wish to note that recommendation 61 of the Secured Transactions Guide leaves an amendment to the discretion of the secured creditor, because if the secured creditor chooses not to register an amendment notice, the only consequence is that its security right will become ineffective as provided in paragraph 2. The Working Group may wish to consider whether failure of the secured creditor to register an amendment notice may affect other parties (e.g., the grantor's insolvency representative) and thus an amendment must be made.]*

### **Article 31. Secured creditor identifier**

1. If the secured creditor is a natural person, the identifier is the name of the secured creditor determined in accordance with article 29, paragraph 2;

2. If the secured creditor is a legal person, the identifier is the name of the secured creditor determined in accordance with article 29, paragraph 3; and

(c) If the secured creditor falls within a special case, the identifier is the name as determined in accordance with article 29, paragraph 4.

### **Article 32. Description of an encumbered asset covered by a notice**

The registration of an initial notice, or an amendment notice that affects the description of the encumbered assets, is effective if the notice describes the encumbered assets in a way that reasonably allows their identification, and if it does not so describe all assets, as provided in article 34, paragraph 4.

*[Note to the Working Group: The Working Group may wish to note that this article, which is based on recommendation 63 of the Secured Transactions Guide, has been revised to be aligned with the formulation of article 29 and to deal with the description of the encumbered assets, leaving the consequences of an insufficient description to article 34, paragraph 4.]*

### **Article 33. Period of effectiveness of the registration of a notice**

#### **Option A**

1. The registration of an initial notice is effective for [a short period of time, such as five years, specified in the law of the enacting State];
2. The period of effectiveness of the registration may be extended within [a short period of time, such as six months, specified in the law of the enacting State] before its expiry; and
3. The registration of an amendment notice extending the period of effectiveness extends the period for [the period of time specified in subparagraph (a)] beginning from the time of expiry of the current period.

#### **Option B**

1. The registration of an initial notice is effective for the period of time indicated by the registrant in the designated field in the notice;
2. The period of effectiveness of the registration may be extended at any time before its expiry by the registration of an amendment notice that indicates in the designated field a new period of effectiveness; and
3. The registration of an amendment notice extending the period of effectiveness extends the period for the amount of time specified by the registrant in the amendment notice beginning from the time of expiry of the current period.

#### **Option C**

1. The registration of an initial notice is effective for the period of time indicated by the registrant in the designated field in the notice, not exceeding [a long period of time, such as, twenty years, specified in the law of the enacting State];
2. The period of effectiveness of the registration may be extended within [a short period of time, such as six months, specified in the law of the enacting State] before its expiry by the registration of an amendment notice that indicates in the designated field a new period of effectiveness not exceeding [the maximum period of time specified in subparagraph (a)]; and
3. The registration of an amendment notice extending the period of effectiveness extends the period for the amount of time specified by the registrant in the amendment notice beginning from the time of expiry of the current period.

*[Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 12 of the Registry Guide, which in turn is based on recommendation 69 of the Secured Transactions Guide.]*

### **Article 34. Consequences of an incorrect statement or insufficient description**

1. An incorrect statement of the grantor identifier in a notice does not render the registration ineffective if the notice would be retrieved by a search of the registry record [conducted by the registry] under the correct identifier.
2. An incorrect identifier of a grantor in a notice does not render the registration ineffective with respect to other grantors correctly identified in the notice.
3. An incorrect statement of the identifier or address of the secured creditor or its representative that does not meet the requirements of article 31 or a description of the encumbered asset that does not meet the requirements of article 32 does not render the

registration of the notice ineffective unless the incorrect or insufficient statement would seriously mislead a reasonable searcher.

4. A description of certain encumbered assets that does not meet the requirements of article 32 does not render a registration of the notice ineffective with respect to other encumbered assets sufficiently described.

[5. An incorrect statement in a notice with respect to the period of effectiveness of registration and the maximum amount for which the security right may be enforced, if applicable, does not render a registered notice ineffective except to the extent that it seriously misled third parties that relied on the registered notice.]<sup>6</sup>

*[Note to the Working Group: The Working Group may wish to note that, with the exception of the change within square brackets in paragraph 1, the changes made in this article (as compared to recommendations 64-66, on which it is based) are intended to align it with recommendation 29 of the Registry Guide. The Working Group may wish to consider the change that appears within square brackets in paragraph 1, which is intended to validate registrations retrieved even though the searcher did not use the correct grantor identifier (because, for example, a State makes the data available for searching by a third party using other, more powerful software that picks up more “hits” than does the search software of the registry office). The Working Group may wish to note that the “seriously misleading test” in the context of paragraph 5 is objective, while the “seriously misleading test” of paragraph 3 is subjective (see Secured Transactions Guide, chap. IV, paras. 84 and 96) and consider whether this matter should be more explicitly reflected in this article and explained in the relevant commentary to be prepared.]*

#### **Article 35. Authority to register an amendment or cancellation notice**

1. The secured creditor may register an amendment or cancellation notice, before or after the creation of the security right or the conclusion of the security agreement.
2. The grantor’s authorization is required for the following types of amendment:
  - (a) Adding encumbered assets;
  - (b) Increasing the amount of the secured obligation [or the maximum amount for which the security right may be enforced];<sup>7</sup> and
  - (c) [...].
3. Registration of an amendment or cancellation notice is [effective regardless of whether it was authorized by the secured creditor or ordered by a judicial or administrative authority] [ineffective unless authorized by the secured creditor or ordered by a judicial or administrative authority, before or after registration].

*[Note to the Working Group: The Working Group may wish to note that, while paragraphs 1 and 2 of this article reflect recommendations or principles of the Secured Transactions Guide and the Registry Guide, paragraph 3 provides alternatives for a matter that was discussed but not resolved in the Registry Guide. The Working Group may also wish to consider and add other types of amendment for which authorization by the grantor should be required.]*

#### **Article 36. Information required in an amendment notice**

An amendment notice must contain the following information in the designated field:

- (a) The unique registration number assigned by the registry to the initial notice to which the amendment relates; and

<sup>6</sup> This provision will be necessary, if the enacting State implements option B or C of article 33 and determines that an indication in the notice of the maximum monetary amount for which the security right may be enforced would be helpful in order to facilitate lending from another creditor.

<sup>7</sup> The words within square brackets will be necessary, if the enacting State determines that an indication in the notice of the maximum monetary amount for which the security right may be enforced would be helpful in order to facilitate lending from another creditor.

- (b) If information is to be added, deleted or changed, the information to be added, deleted or changed in the manner for entering the relevant kind of information in an initial notice in accordance with articles 29, 31 and 32; and
- (c) An amendment notice may relate to one or multiple items of information in a notice.

#### **Article 37. Information required in a cancellation notice**

A cancellation notice must contain in the designated field the unique registration number assigned by the registry to the initial notice to which the cancellation relates.

*[Note to the Working Group: The Working Group may wish to note that articles 36-37 are based on recommendations 30 and 32 of the Registry Guide. The Working Group may also wish to consider whether a definition of the term “registration number” should be included in article 2 or whether that term should be addressed in a separate article.]*

#### **Article 38. Compulsory amendment or cancellation**

1. The secured creditor must register an amendment or cancellation notice, as the case may be, if:
  - (a) The registration of an initial or amendment notice has not been authorized by the grantor at all or to the extent described in the notice;
  - (b) The registration of an initial or amendment notice has been authorized by the grantor but the authorization has been withdrawn and no security agreement has been concluded;
  - (c) The security agreement has been revised in a way that makes the information contained in the notice incorrect or insufficient; or
  - (d) The security right to which the notice relates has been extinguished by payment or other performance of the secured obligation or otherwise and there is no further commitment by the secured creditor to extend credit;
2. In the case of subparagraphs 1(b) to (d) of this article, the secured creditor may charge any fee agreed upon with the grantor;
3. Not later than [a short period of time, such as fifteen days, to be specified by the enacting State] after receipt of a written request from the grantor, the secured creditor must comply with its obligation under subparagraph (a) of this article;
4. Notwithstanding paragraph 2 of this article, no further fee or expense may be charged or accepted by the secured creditor if it complies with the written request from the grantor in accordance with paragraph 3 of this article;
5. If the secured creditor does not comply within the time period provided in paragraph 3 of this article, the grantor is entitled to seek the registration of an amendment or cancellation notice, as the case may be, through a summary judicial or administrative procedure;
6. The grantor is entitled to seek the registration of an amendment or cancellation notice, as the case may be, through a summary judicial or administrative procedure even before expiry of the period stated in paragraph 3 of this article, provided that there are appropriate mechanisms to protect the secured creditor.

*[Note to the Working Group: The Working Group may wish to note that article 38 is based on recommendation 33 of the Registry Guide (rec. 33, subpara. (g) has not been included though, as it does not seem to fit in a model law). The Working Group may also wish to note that paragraph 4 seems to suggest that, if the secured creditor does not comply, it may charge more, which is not the intended result. The Working Group may thus wish to consider replacing the words “if it complies” with the words “with respect to compliance”. Alternatively, the Working Group may wish to consider deleting paragraph 4 altogether and clarifying in paragraph 2 that the secured creditor may charge “only” the agreed upon fees. Another alternative would be to delete paragraphs 2 and 4, and to deal with that matter in the commentary as a matter of contract law.]*



### **Article 39. Time of effectiveness of the registration of an initial or amendment notice**

The registration of an initial or amendment notice becomes effective when the information contained in the notice is entered into the registry record so as to be available [accessible] to searchers of the public registry record.

*[Note to the Working Group: The Working Group may wish to consider whether this article, which is based on recommendation 11 of the Registry Guide, should include language along the lines of recommendations 11, subparagraphs (b) and (c) (the registry to record date and time of effectiveness and enter notices in the order they were received), and 15 (the registry to assign a registration number to the initial notice) of the Registry Guide. The Working Group may also wish to consider the bracketed text in this article in view of the formulation of recommendations 11, subparagraph (a), and 16 of the Registry Guide. The Working Group may also wish to consider whether the time of effectiveness of a cancellation notice should also be addressed.]*

### **Article 40. Searches**

1. Any person may submit a search request to the registry in the manner prescribed by the Regulation.
2. Upon receipt of a search request, the registry must conduct a search and provide a search result in the manner prescribed by the Regulation.
3. Upon receipt of a request, the registry must issue a certificate providing the search result in the manner prescribed by the Regulation.

### **Article 41. Errors by the registry**

1. The registry may register an amendment notice to correct an error or omission made by the registry in entering into the registry record information contained in a notice.
2. In the case of a correction in accordance with paragraph 1 of this article, this Law applies as if the error or omission had never been made.
3. The registry may register an amendment notice to restore data in the registry record (including an entire registration) if it appears to the registry that the data was incorrectly removed from the registry under this Law.
4. In the case of a data restoration in accordance with paragraph 3 of this article, for the purposes of this Law the data is taken never to have been removed from the registry record.

*[Note to the Working Group: The Working Group may wish to consider article 41, which is new. The Working Group may also wish to consider whether article 41 should also deal with the rights of parties that relied on the erroneous information on the registry record.]*

### **Article 42. Responsibility for loss or damage**

#### **Option A<sup>8</sup>**

The responsibility of the registry for loss or damage is limited to system malfunction.

#### **Option B<sup>9</sup>**

The registry is liable for any loss or damage caused by an error in the entry of the information contained in a notice in the registry record.

*[Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 56 of the Secured Transactions Guide, which, however, deals only with the matter addressed in option A of this article. Option B has been added to complete*

<sup>8</sup> For States that permit direct registration and searching by registry users without the intervention of registry personnel.

<sup>9</sup> For States that permit or require the submission of paper notices, the information in which is entered into the registry record by the registry personnel.

*this article. The Working Group may wish to consider whether this article should be retained or the matter should be left to other law of the enacting State. If the Working Group decides to retain this article, it may wish to consider its substance.]*

#### **Article 43. General registry operation provisions**

1. The [the enacting State to determine the authority] may determine registration and search fees, if any, at a level no higher than necessary to recover the cost of setting up and operating the registry.
2. A notice must be submitted in the mode prescribed by the registry.
3. As soon as practicable, the registry must send a copy of a registered notice to each person identified in the notice as the secured creditor at the address set forth in the notice, indicating the date and time when the registration of the notice became effective and the registration number.
4. Within [a short period of time, such as ten days, to be specified by the enacting State] after the person identified in the notice as the secured creditor has received a copy of the registered notice in accordance with paragraph 3 of this article, that person must send a copy of a notice to each person identified in the notice as grantor.
5. Except if an amendment or cancellation notice is submitted by the person identified in the notice as the secured creditor, the registry may not amend information in or remove information from the registry record.
6. The registry must protect the registry record from loss or damage, and provides for back-up mechanisms to allow reconstruction of the registry record.
7. Promptly after a registered notice has expired or has been cancelled the registry must remove from the public registry record information contained in the notice and archive it for [a long period of time, such as twenty years, to be specified by the enacting State].

*[Note to the Working Group: The Working Group may wish to note that article 44 is an omnibus provision dealing with registry “housekeeping” matters and consider whether the various paragraphs should be presented as separate articles (e.g., paragraph 1 could be in a separate article, paragraph 2 could be moved to article 44, paragraphs 3 and 4 could form one article and paragraphs 5 and 6 could form yet another article). The Working Group may also wish to consider whether there should be a reasonableness test for the registry office in paragraph 1 so that the fee is not declared invalid because it is, for example, 1 € too high. The Working Troup may also wish to consider “cost” should also include indirect costs (e.g., salary of a person who runs the relevant section of the Government).]*

#### **Article 44. Registry forms**

The registry must issue standard registration and search request forms, and accept them for registration and searching, unless information is not entered in each required designated field of the notice or if the information entered is not legible.

#### **Article 45. Impact of a transfer of an encumbered asset on the effectiveness of the registration**

##### **Option A**

1. If, after an initial or amendment notice describing the encumbered assets is registered, the encumbered asset is transferred and a search against the transferee’s name by a third party does not disclose the security right created by the transferor, the secured creditor must amend the notice to provide the transferee’s identifier as a new grantor.
2. If the secured creditor does not register the amendment notice within [a short period of time to be specified by the enacting State] days after the transfer of the encumbered asset, the security right is ineffective against:
  - (a) A competing security right with respect to which a notice is registered or which is otherwise made effective against third parties after the transfer but before registration of the amendment notice; and

(b) A person that buys, leases or licenses the encumbered asset after its transfer but before registration of the amendment notice.

### Option B

1. If, after an initial or amendment notice describing the encumbered assets is registered, the encumbered asset is transferred and a search against the transferee's name by a third party does not disclose the security right created by the transferor, the secured creditor must amend the notice to provide the transferee's identifier as a new grantor.

2. If the secured creditor does not register the amendment notice within [a short period of time, such as fifteen days, to be specified by the enacting State] days after *the secured creditor acquires [actual] knowledge about* the transfer of the encumbered asset, the security right is ineffective against:

(a) A competing security right with respect to which a notice is registered or which is otherwise made effective against third parties after the transfer but before registration of the amendment notice; and

(b) A person that buys, leases or licenses the encumbered asset after its transfer but before registration of the amendment notice.

### Option C

Registration of an initial or amendment notice in the security rights registry remains effective notwithstanding a transfer of the encumbered asset.

*[Note to the Working Group: The Working Group may wish to note that: (a) this article reflects the three approaches to the issue discussed in the commentary of the Secured Transactions Guide (see chap. IV, paras. 78-80), as recommendation 62 of that Guide had left the matter to the discretion of each State; (b) the difference between options A and B lies in the text that appears in option B in italics (the word "actual" appears within square brackets as the term "knowledge" is defined to mean actual knowledge" (see article 2, subpara.(p)); and (c) option C has been implemented in recommendation 244 of the Supplement on Security Rights in Intellectual Property. The Working Group may also wish to consider whether the registration of an amendment notice should be left to the discretion of the secured creditor ("may" instead of "must"), assuming that failure of the secured creditor to register such an amendment notice would only have an impact on the third-party effectiveness and priority of its security right as provided in paragraph 2 (see also note to article 30). The Working Group may also wish to consider including in article 22 a cross-reference to article 45, as article 22 seems to suggest that a transfer of an encumbered asset does not affect its third-party effectiveness, without requiring any other act (option C).]*

## (A/CN.9/WG.VI/WP.57/Add.2) (Original: English)

## Note by the Secretariat on a Draft Model Law on Secured Transactions

## ADDENDUM

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## Chapter V. Priority of a security right

### Section I. General priority rules

#### Article 46. Priority among security rights granted by the same grantor in the same encumbered asset

1. Subject to articles 47-50, 54 and [[2-5 of Annex I (unitary approach)] [4 (non-unitary approach)]], priority among competing security rights granted by the same grantor in the same encumbered asset is determined according to the order of registration in the general security rights registry or third-party effectiveness, whichever occurs first.
2. The priority of a security right is not affected by a change in the method by which it is made effective against third parties, provided that there is no time during which the security right is not effective against third parties.
- [3. The priority of a security right extends to all encumbered assets described in the registered notice, irrespective of whether they are acquired by the grantor or come into existence before, at or after the time of registration.
4. The time of third-party effectiveness or the time of registration of a notice with respect to a security right in an encumbered asset is also the time of third-party effectiveness or registration with respect to a security right in its proceeds.]

*[Note to the Working Group: The Working Group may wish to note that paragraph 1 of this article reflects in general terms recommendation 76 of the Secured Transactions Guide. If the Working Group agrees with this formulation, it may wish to note that the commentary could explain that paragraph 1 applies to conflicts of priority among security rights that were made effective against third parties by registration, among security rights that were made effective against third parties otherwise than by registration and among security rights that were made effective against third parties by registration and security rights that were made effective against third parties otherwise than by registration (always in the general security rights registry). The Working Group may also wish to note that the commentary will explain that specific reference is made to registration (although it is a method of third-party effectiveness) because advance registration (before creation) does not amount to third-party effectiveness and yet it is sufficient as a basis for priority once a security right is created and thus made effective against third parties as of the date of the advance registration.*

*The Working Group may wish to consider whether paragraph 2 of this article (which is based on recommendation 95 of the Secured Transactions Guide is relevant only to article 46 (and should be retained as paragraph 2) or has relevance for other articles as well (and should be reflected in a separate article on the impact of the continuity in third-party effectiveness on priority).*

*The Working Group may also wish to note that no article has been prepared to reflect recommendation 96 of the Secured Transactions Guide as that recommendation repeats essentially the point made in paragraph 2 of this article and could be discussed in the commentary).*

*The Working Group may also wish to consider whether paragraphs 3 and 4 are necessary and should be retained or whether they should be deleted and the matters addressed therein discussed in the commentary.*

*The Working Group may also wish to note that acquisition finance priority rules are set out in annex I for each enacting State to determine where they fit in its secured transactions law. The Working Group may wish to consider whether the acquisition finance priority rules (unitary approach) should be listed in a section II of the priority chapter and the acquisition finance third-party effectiveness rules (non-unitary approach) in the third-party effectiveness chapter (and other acquisition finance rules should be included in the relevant chapter, e.g. on enforcement, etc.), all within square brackets.]*

**Article 47. Priority of rights of transferees, lessees and licensees of an encumbered asset**

1. If an encumbered asset is transferred, leased or licensed and a security right in that asset is effective against third parties at the time of the transfer, lease or licence, a transferee, lessee or licensee takes its rights subject to the security right except as provided in this article.
2. A security right does not continue in an encumbered asset that the grantor sells or otherwise disposes of, if the secured creditor authorizes the sale or other disposition free of the security right.
3. The rights of a lessee or licensee of an encumbered asset are not affected by a security right if the secured creditor authorizes the grantor to lease or license the asset unaffected by the security right.
4. A buyer of a tangible asset (other than a negotiable instrument or negotiable document) sold in the ordinary course of the seller's business takes free of a security right in the asset, provided that, at the time of the conclusion of the sale agreement, the buyer does not have knowledge that the sale violates the rights of the secured creditor under the security agreement.
5. The rights of a lessee of a tangible asset (other than a negotiable instrument or negotiable document) leased in the ordinary course of the lessor's business are not affected by a security right in the asset, provided that, at the time of the conclusion of the lease agreement, the lessee does not have knowledge that the lease violates the rights of the secured creditor under the security agreement.
6. The rights of a non-exclusive licensee of an intangible asset licensed in the ordinary course of the licensor's business are not affected by a security right in the asset, provided that, at the time of the conclusion of the licence agreement, the licensee does not have knowledge that the licence violates the rights of the secured creditor under the security agreement.
7. If a buyer or other transferee acquires an encumbered asset free of a security right, any person that subsequently acquires a right in the asset from the buyer also takes free of the security right.
8. If the rights of a lessee or licensee are not affected by a security right, the rights of a sub-lessee or sub-licensee are also unaffected by the security right.

**Article 48. Priority of rights of the grantor's insolvency representative [and creditors in the grantor's insolvency]**

If the grantor is subject to insolvency proceedings, a security right that is effective against third parties has priority over the rights of the grantor's insolvency representative [and the creditors in the grantor's insolvency].

**Article 49. Priority of preferential claims**

Only the following claims have priority over a security right that is effective against third parties and only up to the amount specified for each category of claimant:

- (a) [...];
- (b) [...].<sup>1</sup>

**Article 50. Priority of rights of judgement creditors**

1. Subject to the provision of this Law dealing with the priority of an acquisition security right over the rights of a judgement creditor, a security right has priority as against the rights of an judgement creditor, unless the judgement creditor, under other law, took the steps

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<sup>1</sup> The enacting State should list in a clear and specific way preferential claims, if any, and the amount up to which they will have priority over security rights. The enacting State will also need to consider whether these preferential claims should be set out in its insolvency law (and therefore would be applicable only if the grantor is involved in insolvency proceedings) or if they are also capable of being applied outside of insolvency.

necessary to acquire rights in the encumbered asset by reason of the judgement or provisional court order before the security right was made effective against third parties.

2. The priority of the security right extends to credit disbursed by the secured creditor:

(a) Before the expiry of [a short period of time, such as thirty days, to be specified by the enacting State] days after the unsecured creditor notified the secured creditor that it had taken the steps necessary to acquire rights in the encumbered asset; or

(b) Pursuant to an irrevocable commitment in a fixed amount or an amount to be fixed pursuant to a specified formula of the secured creditor to extend credit, if the commitment was made before the judgement creditor notified the secured creditor that it had taken the steps necessary to acquire rights in the encumbered asset by reason of the judgement or provisional court order.

*[Note to the Working Group: The Working Group may wish to consider including in article 2 a definition of the term “judgement creditor” along the following lines “‘Judgement creditor’ means an unsecured creditor that has obtained a judgement or provisional court order against the grantor”. The Working Group may also wish to consider whether the secured creditor should lose its priority only if it received the notification and, if so, whether this matter should be clarified in subparagraph 2 (b) of this article or in the commentary.]*

*This article is intended to reflect recommendation 84 of the Secured Transactions Guide. The Working Group may wish to consider whether another approach, which is followed in many States with modern secured transactions regimes, might also be reflected at least in the commentary of the draft Model Law. Under such an approach, creditors can register a notice of judgement and thereby acquire the same priority rights as a secured creditor (in other words, the general first-to-register priority rule applies).]*

#### **Article 51. Irrelevance of knowledge of the existence of a security right**

Knowledge of the existence of a security right on the part of a competing claimant does not affect priority.

*[Note to the Working Group: The Working Group may wish to note that the commentary will explain that, unlike knowledge of the existence of a security right that does not affect priority, knowledge that a transaction violates the rights of a secured creditor does affect priority (see articles 47, paragraphs 4-6, 114, paragraph 4, and 115, paragraph 1).]*

#### **Article 52. Subordination**

A competing claimant entitled to priority may at any time subordinate its priority unilaterally or by agreement in favour of any other existing or future competing claimant.

*[Note to the Working Group: The Working Group may wish to consider whether the subordination agreement has to be in writing or may also be oral. The Working Group may also wish to consider whether the commentary should explain whether, if third-party effectiveness of the security right has been established by registration of a notice, an amendment notice may be registered to reflect the new order of priority.]*

#### **Article 53. Extent of priority**

[1.] Subject to article 50, the priority of a security right extends to all secured obligations, regardless of the time when they are incurred.

[2.] The priority of the security right is limited to the maximum amount set out in the registered notice.]<sup>2</sup>

<sup>2</sup> If the enacting State implements article 27, subparagraph (d) (A/CN.9/WG.VI/WP.57/Add.1), it may wish to include in this article paragraph 2.

## Section II. Special priority rules

### Article 54. Priority of a security right registered in a specialized registry or noted on a title certificate

1. A security right in an asset that is made effective against third parties by registration in a specialized registry or notation on a title certificate has priority as against:

(a) A security right in the same asset with respect to which a notice is registered in the general security rights registry or which is made effective against third parties by a method other than registration in a specialized registry or notation on a title certificate, regardless of the order of registration; and

(b) A security right that is subsequently registered in the specialized registry or noted on a title certificate.

2. If an encumbered asset is transferred or leased and, at the time of transfer or lease, a security right in that asset is effective against third parties by registration in a specialized registry or notation on a title certificate, the transferee or lessee takes its rights subject to the security right, except as provided in paragraphs 2-8 of article 47.

3. If the security right has not been made effective against third parties by registration in a specialized registry or notation on a title certificate, a buyer acquires the asset free of the security right and a lessee's or licensee's rights are unaffected by the security right.

*[Note to the Working Group: The Working Group may wish to consider whether there is a need to refer to notation of title or it is enough to refer to specialized registration systems.]*

### Article 55. Special priority claims

1. If other law gives rights equivalent to security rights to a creditor that has provided services with respect to an encumbered asset, such rights are limited to the asset in the possession of that creditor up to the reasonable value of the services rendered and have priority as against security rights in the asset that were made effective against third parties by one of the methods referred to in chapter III of this Law.

2. If other law provides that a supplier of tangible assets has the right to reclaim them, the right to reclaim is subordinate to a security right that was made effective against third parties before the supplier exercised its right.

3. [...].<sup>3</sup>

## Chapter VI. Enforcement of a security right

### Article 56. General standard of conduct in the context of enforcement

A person must enforce its rights and perform its obligations under the provisions of this chapter in good faith and in a commercially reasonable manner.

### Article 57. Limitations on party autonomy

1. The general standard of conduct cannot be waived unilaterally or varied by agreement at any time.

2. Subject to paragraph 1 of this article:

(a) The grantor and any other person that owes payment or other performance of the secured obligation may waive unilaterally or vary by agreement any of its rights under the provisions of this chapter, but only after default; and

<sup>3</sup> If a State decides to list any additional claims that have priority over a security right, they should be limited both in type and amount, and described in a clear and specific way in this article.



(b) The secured creditor may waive unilaterally or vary by agreement any of its rights under the provisions of this chapter.

*[Note to the Working Group: The Working Group may wish to consider whether this article (and article 58) should be revised and moved to chapter I to apply more generally to all the rights and obligations under the draft Model Law (“All rights and obligations arising under this Law must be exercised and performed in good faith and in a commercially reasonable manner”). The Working Group may also wish to note that recommendation 135 has not been included in the draft Model Law. The principle that a variation of rights by agreement may not adversely affect the rights of any person not a party to the agreement is a matter of contract law and is, in any case, reflected in article 3; and the principle that a person challenging the effectiveness of the agreement on the ground that is inconsistent with the provisions of this article has the burden of proof is a matter of civil procedure law. If the Working Group agrees with this approach, it may wish to consider whether these matters should be explained in the commentary.]*

### **Article 58 Liability**

A person that fails to comply with its obligations under the provisions of this chapter is liable for damages caused by its failure.

### **Article 59. Judicial or other relief for non-compliance**

The debtor, the grantor or any other interested person is entitled at any time to apply to a court or other authority for relief from the secured creditor’s failure to comply with its obligations under the provisions of this chapter.

*[Note to the Working Group: The Working Group may wish to reconsider the policy and the formulation of this article, which seems to be stating that a debtor may go to court only if there is a violation of the provisions of this chapter. If this article is intended to deal with extra-judicial enforcement, it needs to be revised to refer to extra-judicial enforcement. The Working Group may also wish to consider whether the commentary to this article should discuss procedural rights in the case of a violation of obligations under the draft Model Law in general. The Working Group may also wish to note that, for the purposes of this and other articles, the commentary will give examples of interested persons, such as a secured creditor with a lower priority ranking than that of the enforcing secured creditor, a guarantor or a co-owner of the encumbered assets.]*

### **Article 60. Expeditious judicial proceedings**

Where the secured creditor, the grantor or any other person that owes performance of the secured obligation, or claims to have a right in an encumbered asset, applies to a court or other judicial authority with respect to the exercise of post-default rights, the proceedings should be conducted in a reasonably expeditious manner.

*[Note to the Working Group: The Working Group may wish to consider whether this article should be retained or deleted and the matter discussed in the commentary. If the Working Group decides to retain this article, it may wish to revise it to provide for expeditious judicial proceedings.]*

### **Article 61. Post-default rights of the grantor and the secured creditor**

1. After default, the grantor and the secured creditor are entitled to exercise one or more of the rights provided in this chapter, in the security agreement or any law, except to the extent the exercise of a right violates a provision of this Law.
2. The exercise of one post-default right does not prevent the exercise of another post-default right, except to the extent that the exercise of one right has made the exercise of another right impossible.
3. The exercise of a post-default right with respect to an encumbered asset does not prevent the exercise of a post-default right with respect to the secured obligation, and vice versa.

### **Article 62. Judicial and extrajudicial methods of exercising post-default rights**

1. After default, the secured creditor may exercise its rights provided in this chapter either by applying to a court or other authority, or without application to a court or other authority.
2. Extrajudicial exercise of the secured creditor's rights is subject to the general standard of conduct provided in article 56 and the requirements provided in this chapter with respect to extrajudicial obtaining of possession and disposition of an encumbered asset.

### **Article 63. Right to take over enforcement**

1. If a secured creditor or judgement creditor has commenced enforcement, a secured creditor whose security right has priority as against that of the enforcing secured creditor or the enforcing judgement creditor is entitled to take control of the enforcement process at any time before the earlier of the final disposition or acquisition or collection of the encumbered asset by the enforcing secured creditor or judgement creditor or the conclusion of an agreement by the enforcing secured creditor to dispose of the encumbered asset.
2. The right to take control includes the right to enforce by any method available under the provisions of this chapter.

### **Article 64. Right of redemption**

1. The debtor, the grantor or any other interested person is entitled to redeem the encumbered asset by paying or otherwise performing the secured obligation in full, including payment of interest and the cost of enforcement.
2. This right may be exercised until the earlier of the disposition, acquisition or collection of an encumbered asset by the secured creditor or the conclusion of an agreement by the secured creditor to dispose of the encumbered asset.

### **Article 65. Extinction of the security right after full satisfaction of the secured obligation**

If all commitments to extend credit have terminated, full satisfaction of the secured obligation extinguishes the security right in all encumbered assets, subject to any rights of subrogation in favour of the person satisfying the secured obligation.

*[Note to the Working Group: The Working Group may wish to consider whether this article states a general point that goes beyond chapter VI on enforcement and should be included rather in chapter II on creation and rights and obligations of the parties. If the Working Group decides that the thrust of this article should be moved to chapter III, it may wish to consider whether a revised version of this article with a narrower scope or a cross reference to the relevant article in chapter III could be retained, perhaps in article 64.]*

### **Article 66. Secured creditor's right to possession of an encumbered asset**

After default the secured creditor is entitled to possession of a tangible encumbered asset.

### **Article 67. Extrajudicial obtaining of possession of an encumbered asset**

The secured creditor may elect to obtain possession of a tangible encumbered asset without applying to a court or other authority only if:

- (a) The grantor has consented in the security agreement to the secured creditor obtaining possession without applying to a court or other authority;
- (b) The secured creditor has given the grantor and any person in possession of the encumbered asset notice of default and of the secured creditor's intent to obtain possession without applying to a court or other authority; and

(c) At the time the secured creditor seeks to obtain possession of the encumbered asset the grantor and any person in possession of the encumbered asset does not object.

#### **Article 68. Extrajudicial disposition of an encumbered asset**

1. After default, a secured creditor is entitled, without applying to a court or other authority, to sell or otherwise dispose of, lease or license an encumbered asset to the extent of the grantor's rights in the encumbered asset.
2. Subject to the standard of conduct provided in article 56, a secured creditor that elects to exercise this right may select the method, manner, time, place and other aspects of the sale or other disposition, lease or licence referred to in paragraph 1 of this article.

#### **Article 69. Advance notice of extrajudicial disposition of an encumbered asset**

1. After default, the secured creditor must give notice of its intention to sell or otherwise dispose of, lease or licence an encumbered asset in accordance with article 68.
2. The notice must be given to:
  - (a) The grantor, the debtor and any other person that owes performance of the secured obligation;
  - (b) Any person with rights in the encumbered asset that notifies in writing the secured creditor of those rights, at least [a short period of time to be specified by the enacting State] days before the sending of the notice by the secured creditor to the grantor;
  - (c) Any other secured creditor that registered a notice with respect to a security right in the encumbered asset, at least [a short period of time to be specified by the enacting State] days before the notice is sent to the grantor; and
  - (d) Any other secured creditor that was in possession of the encumbered asset at the time when the enforcing secured creditor took possession of the asset.
3. The notice must be given in writing at least [a short period of time, such as fifteen days, to be specified by the enacting State] days before extrajudicial disposition takes place and must contain a description of the encumbered assets, a statement of the amount required to satisfy the secured obligation including interest and the cost of enforcement, a reference to the right of the debtor or the grantor to redeem the encumbered asset as provided in article 64 and a statement of the date after which the encumbered asset will be disposed of and the manner of the intended disposition.
4. The notice must be in a language that is reasonably expected to inform its recipients about its contents.
5. It is sufficient if the notice to the grantor is in the language of the security agreement being enforced.
6. The notice need not be given if the encumbered asset is perishable, may decline in value speedily or is of a kind sold on a recognized market.

*[Note to the Working Group: The Working Group may wish to recall the question raised in the note to the definition of the term "notice" in article 2 (A/CN.9/WG.VI/WP.57). If the Working Group decides not to introduce a new term for a notice to be registered in the registry, to avoid confusion, it may wish to refer in this article to "notification" or similar term (in view of the use of the term "notification of the assignment" in the draft Model Law). The Working Group may wish to note that no text has been included in this article to reflect recommendation 150 of the Secured Transactions Guide, as that recommendation is aspirational and does not fit in model law but could be discussed in the commentary.]*

#### **Article 70. Distribution of proceeds of disposition of an encumbered asset**

1. In the case of extrajudicial disposition of an encumbered asset:
  - (a) The enforcing secured creditor must apply the net proceeds of its enforcement after deducting costs of enforcement to the secured obligation;

(b) Except as provided in subparagraph 1 (c) of this article, the enforcing secured creditor must pay any surplus remaining to any subordinate competing claimant that, prior to any distribution of the surplus, notified the enforcing secured creditor of its claim, to the extent of the amount of that claim, and any balance remaining must be remitted to the grantor; and

(c) Whether or not there is any dispute as to the entitlement or priority of any competing claimant under this Law, the enforcing secured creditor may, in accordance with generally applicable procedural rules, pay the surplus to a competent judicial or other authority or to a public deposit fund for distribution.

2. Distribution of the proceeds realized by a judicial disposition or other officially administered enforcement process is to be made pursuant to [the general rules of the enacting State governing execution proceedings], but in accordance with the provisions of this Law on priority.

3. The debtor and any other person that owes payment or other performance of the secured obligation remain liable for any shortfall owing after application of the net proceeds of enforcement to the secured obligation.

#### **Article 71. Acquisition of an encumbered asset in satisfaction of the secured obligation**

1. After default, the secured creditor may propose in writing to acquire one or more of the encumbered assets in total or partial satisfaction of the secured obligation.

2. The proposal must be sent to:

(a) The grantor, the debtor and any other person that owes payment or other performance of the secured obligation, including a guarantor;

(b) Any person with rights in the encumbered asset that has notified in writing the secured creditor of those rights, at least [a short period of time such as fifteen days to be specified by the enacting State] days before the proposal is sent by the secured creditor to the grantor;

(c) Any other secured creditor that registered a notice with respect to a security right in the encumbered asset, at least [a short period of time such as fifteen days to be specified by the enacting State] days before the proposal is sent by the secured creditor to the grantor; and

(d) Any other secured creditor that was in possession of the encumbered asset at the time the secured creditor took possession.

3. The proposal must contain a description of the encumbered asset, a statement of the amount required to satisfy the secured obligation, including interest and the cost of enforcement, a reference to the right of the debtor or the grantor to redeem the encumbered asset as provided in article 64, and a statement of the date after which the encumbered asset will be acquired by the secured creditor.

4. The secured creditor may acquire the encumbered asset as provided in paragraph 1 of this article, unless the secured creditor receives an objection in writing from any person entitled to receive such a proposal within [a short period of time such as fifteen days to be specified by the enacting State] days, after the proposal is sent.

5. In the case of a proposal for the acquisition of the encumbered asset in partial satisfaction, affirmative consent by each addressee of the proposal is necessary.

6. The grantor may make such a proposal and if the secured creditor accepts it, the secured creditor must proceed as provided in paragraphs 2-5 of this article.

*[Note to the Working Group: The Working Group may wish to note that a contrario paragraph 5 of this article means that, in the case of full satisfaction of the secured obligation, affirmative consent by each address of the proposal is not needed; it is sufficient if each addressee does not object in a timely fashion (see chapter VIII, para. 70 of the Secured Transactions Guide). The Working Group may wish to consider this policy and, if this policy is confirmed, whether it should be reflected in this article explicitly.]*

**Article 72. Rights acquired through judicial disposition**

If a secured creditor disposes of an encumbered asset through a judicial or other officially administered process, the rights acquired by the transferee are determined by [the general rules of the enacting State governing execution proceedings].

**Article 73. Rights acquired through extrajudicial disposition**

1. If a secured creditor sells or otherwise disposes of an encumbered asset in accordance with article 68, paragraph 1, a person that acquires the grantor's right in the asset takes the asset subject to rights that have priority as against the security right of the enforcing secured creditor, but free of rights of the enforcing secured creditor and any competing claimant whose right has a lower priority than that of the enforcing secured creditor.
2. The rule provided in paragraph 1 of this article applies to rights in an encumbered asset acquired by a secured creditor in accordance with article 71.
3. If a secured creditor leases or licenses an encumbered asset in accordance with article 68, paragraph 2, a lessee or licensee is entitled to the benefit of the lease during its term, except as against rights that have priority over the right of the enforcing secured creditor.
4. If the secured creditor sells or otherwise disposes of, leases or licenses the encumbered asset not in accordance with the provisions of this chapter, a good faith acquirer or lessee of the encumbered asset acquires the rights or benefits described in paragraphs 1 and 3 of this article.

*[Note to the Working Group: The Working Group may wish to consider specifying what is meant by good faith acquirer in the context of paragraph 4 of this article.]*

## (A/CN.9/WG.VI/WP.57/Add.3) (Original: English)

## Note by the Secretariat on a Draft Model Law on Secured Transactions

## ADDENDUM

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## Chapter VII. Asset-specific rules

*[Note to the Working Group: The Working Group may wish to note that, to emphasize that, depending on whether it already has modern asset-specific rules, a State may implement all, some or none of the asset-specific rules, the Secured Transactions Guide presents them in a separate section in each chapter. For the same reason but also to give States an overview of all asset-specific rules, they are all included in chapter VII of this version of the draft Model Law. If the Working Group decides that asset-specific rules should be included in the draft Model Law, the Working Group may wish to consider whether the way in which this material is currently presented (that is, in an asset-specific chapter) is the best way. Another alternative might be to keep the asset-specific rules, as in the Secured Transactions Guide, in a separate section of each relevant chapter (that is, creation, third-party effectiveness, priority, etc.). Yet another alternative might be to incorporate the asset-specific rules into the general rules in each relevant chapter. In any case, the way in which this material is presented would be a “recommended” approach but not the only approach. In other words, it would be up to each enacting State to decide how to implement the provisions of the draft Model Law, such as, for example, in a single statute on secured transactions, in one chapter of a single statute (civil or commercial code or other statute), in various parts of a statute or in various statutes.]*

### Section I. Receivables

#### Article 74. Anti-assignment clauses

1. An assignment of a receivable is effective as between the assignor and the assignee and as against the debtor of the receivable notwithstanding an agreement between the initial

or any subsequent assignor and the debtor of the receivable or any subsequent assignee limiting in any way the assignor's right to assign its receivables.

2. Nothing in this article affects any obligation or liability of the assignor for breach of the agreement mentioned in paragraph 1 of this article, but the other party to the agreement may not avoid the original contract or the assignment contract on the sole ground of the breach of that agreement[, or raise against the assignee any claim it may have as a result of such a breach against the assignor, as provided in article 82, paragraph 3].

3. A person that is not a party to the agreement mentioned in paragraph 1 of this article is not liable on the sole ground that it had knowledge of the agreement.

4. This article applies only to assignments of receivables:

(a) Arising from an original contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of immovable property;

(b) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;

(c) Representing the payment obligation for a credit card transaction; or

(d) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

*[Note to the Working Group: The Working Group may wish to note that article 74 is based on recommendation 24 of the Secured Transactions Guide, which in turn is based on article 9 of the United Nations Convention on the Assignment of Receivables in International Trade (the "United Nations Assignment Convention"). The main difference is the text within square brackets in article 74, paragraph 2 (and article 75, paragraph 5) which includes a cross-reference to article 82, paragraph 3. The Working Group may wish to consider whether paragraph 4 should be retained or deleted and the matter addressed therein discussed in the commentary.]*

#### **Article 75. Creation of a security right in a personal or property right that secures a receivable**

1. A secured creditor with a security right in a receivable has the benefit of any personal or property right that secures payment or other performance of the receivable automatically without further action by either the grantor or the secured creditor.

2. If the right referred to in paragraph of this article is an independent undertaking, the security right automatically extends to the right to receive the proceeds under the independent undertaking, but not to the right to draw under the independent undertaking.

[3. This article does not affect a right in immovable property that under other law is transferable separately from a receivable that it may secure.]<sup>1</sup>

4. A secured creditor with a security right in a receivable has the benefit of any personal or property right that secures payment or other performance of the receivable notwithstanding any agreement between the assignor and the debtor of the receivable limiting in any way the assignor's right to create a security right in the receivable, or in any personal or property right securing payment or other performance of the receivable.

5. Nothing in this article affects any obligation or liability of the assignor for breach of the agreement mentioned in paragraph 4 of this article, but the other party to the agreement may not avoid the contract from which the receivable arises, or the agreement creating the personal or property security right on the sole ground of the breach of that agreement[, or raise against the assignee any claim it may have as a result of such a breach against the assignor, as provided in article 82, paragraph 3].

6. A person that is not a party to the agreement mentioned in paragraph 4 of this article is not liable on the sole ground that it had knowledge of the agreement.

<sup>1</sup> An enacting State may wish to consider implementing this paragraph only if it has a law such as the one described therein.



7. Paragraphs 4 to 6 of this article apply only to security rights in receivables:
- (a) Arising from an original contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of immovable property;
  - (b) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;
  - (c) Representing the payment obligation for a credit card transaction; or
  - (d) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.
8. Paragraph 1 of this article does not affect any duties of the assignor to the debtor of the receivable.
9. To the extent that the automatic effects under paragraph 1 of this article and article 102 are not impaired, this article does not affect any requirement under other law relating to the form or registration of the creation of a security right in any asset, securing payment or other performance of a receivable.

*[Note to the Working Group: The Working Group may wish to note that article 75 is based on recommendation 25 of the Secured Transactions Guide, which in turn is based on article 10 of the United Nations Assignment Convention (references to negotiable instruments and negotiable documents have been deleted since this section of the draft Model Law deals with receivables, but these articles are made applicable to negotiable instruments-see footnote 3). The Working Group may wish to consider whether: (a) the words the heading and the text of this article as a whole (and article 86) should refer to a secured creditor "having the benefit" of a personal or property right securing payment of a receivable (as is done in para. 1 of this article) or to the security right "extending to" the personal or property right (as is done in paragraph 2 of this article and article 86); (b) paragraphs 7-9 should be retained or deleted and the matters addressed therein discussed in the commentary; and (c) the provisions in the sections on receivables should refer to the "assignor" and the "assignee" rather than to the "grantor" and the "secured creditor", terms that are used in the rest of the draft Model Law and, for convenience, are defined to include the "assignor" and the "assignee" (see article 2).]*

#### **Article 76. Representations of the assignor**

1. Unless otherwise agreed between the assignor and the assignee, the assignor represents at the time of conclusion of the contract of assignment that:
- (a) The assignor has the right to assign the receivable;
  - (b) The assignor has not previously assigned the receivable to another assignee; and
  - (c) The debtor of the receivable does not and will not have any defences or rights of set-off.
2. Unless otherwise agreed between the assignor and the assignee, the assignor does not represent that the debtor of the receivable has, or will have, the ability to pay.

#### **Article 77. Right to notify the debtor of the receivable**

1. Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor of the receivable notification of the assignment and a payment instruction, but after notification has been sent only the assignee may send a payment instruction.
2. Notification of an assignment or a payment instruction sent in breach of an agreement referred to in paragraph 1 of this article is not ineffective for the purposes of article 84, but nothing in this article affects any obligation or liability of the party in breach for any damages arising as a result of the breach.

*[Note to the Working Group: The Working Group may wish to note that in this and other articles reference is made to "notification of the assignment", as it is a defined term*

(see article 2, subpara. (r)). The Working Group may wish to consider whether the defined term to be used should rather be the term “notification of an assignment”.]

#### **Article 78. Right of the assignee to payment**

1. As between the assignor and the assignee, unless otherwise agreed and whether or not notification of the assignment has been sent, the assignee is entitled:

(a) To retain the proceeds of any payment made to the assignee and tangible assets returned to the assignee in respect of the assigned receivable;

(b) To the proceeds of any payment made to the assignor and also to any tangible assets returned to the assignor in respect of the assigned receivable; and

(c) To the proceeds of any payment made to another person and tangible assets returned to such person in respect of the assigned receivable, if the right of the assignee has priority over the right of that person.

2. The assignee’s rights under paragraph 1 of this article are limited to the value of the obligation secured by its security right in the receivable.

*[Note to the Working Group: The Working Group may wish to note that the commentary will clarify that articles 76-78 are based on recommendations 114-116 of the Secured Transactions Guide, which in turn are based articles 12-14 of the United Nations Assignment Convention. The changes made are intended to clarify without changing the substance of these articles.]*

#### **Article 79. Protection of the debtor of the receivable**

1. Except as otherwise provided in this Law, an assignment does not, without the consent of the debtor of the receivable, affect the rights and obligations of the debtor of the receivable, including the payment terms contained in the original contract.

2. A payment instruction may change the person, address or account to which the debtor of the receivable is required to make payment, but may not change:

(a) The currency of payment specified in the original contract; or

(b) The State specified in the original contract in which payment is to be made to a State other than that in which the debtor of the receivable is located.

#### **Article 80. Notification of an assignment**

1. Notification of an assignment or a payment instruction is effective when received by the debtor of the receivable if it is in a language that is reasonably expected to inform the debtor of the receivable about its contents.

2. It is sufficient if notification of the assignment or a payment instruction is in the language of the original contract between the assignor and the debtor of the receivable.

3. Notification of the assignment or a payment instruction may relate to receivables arising after notification.

4. Notification of a subsequent assignment constitutes notification of all prior assignments.

#### **Article 81. Discharge of the debtor of the receivable by payment**

1. Until the debtor of the receivable receives notification of the assignment, it is entitled to be discharged by paying in accordance with the original contract.

2. After the debtor of the receivable receives notification of the assignment, subject to paragraphs 3-8 of this article, it is discharged only by paying the assignee or, if otherwise instructed in the notification or subsequently by the assignee in a writing received by the debtor of the receivable, in accordance with the payment instruction.

3. If the debtor of the receivable receives more than one payment instruction relating to a single assignment of the same receivable by the same assignor, it is discharged by paying in accordance with the last payment instruction received from the assignee before payment.

4. If the debtor of the receivable receives notification of more than one assignment of the same receivable made by the same assignor, it is discharged by paying in accordance with the first notification received.
5. If the debtor of the receivable receives notification of one or more subsequent assignments, it is discharged by paying in accordance with the notification of the last of such subsequent assignments.
6. If the debtor of the receivable receives notification of the assignment of a part of or an undivided interest in one or more receivables, it is discharged by paying in accordance with the notification or in accordance with this article as if the debtor of the receivable had not received the notification.
7. If the debtor of the receivable receives a notification as provided in paragraph 6 of this article and pays in accordance with the notification, it is discharged only to the extent of the part or undivided interest paid.
8. If the debtor of the receivable receives notification of the assignment from the assignee, it is entitled to request the assignee to provide within a reasonable period of time adequate proof that the assignment from the initial assignor to the initial assignee and any intermediate assignment have been made and, unless the assignee does so, the debtor of the receivable is discharged by paying in accordance with this article as if the notification from the assignee had not been received.
9. Adequate proof of an assignment referred to in paragraph 8 of this article includes but is not limited to any writing emanating from the assignor and indicating that the assignment has taken place.
10. This article does not affect any other ground on which payment by the debtor of the receivable to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund discharges the debtor of the receivable.

**Article 82. Defences and rights of  
set-off of the debtor of the receivable**

1. Unless otherwise agreed as provided in article 83, in a claim by the assignee against the debtor of the receivable for payment of the assigned receivable, the debtor of the receivable may raise against the assignee:
  - (a) All defences and rights of set-off arising from the original contract, or any other contract that was part of the same transaction, of which the debtor of the receivable could avail itself as if the assignment had not been made and the claim were made by the assignor; and
  - (b) Any other right of set-off that was available to the debtor of the receivable at the time it received notification of the assignment.
3. Notwithstanding paragraph 1 of this article, the debtor of the receivable may not raise as a defence or right of set-off against the assignor breach of an agreement mentioned in article 74, paragraph 2, or article 75, paragraph 5, limiting in any way the assignor's right to make the assignment.

**Article 83. Agreement not to raise  
defences or rights of set-off**

1. Subject to paragraph 3 of this article, the debtor of the receivable may agree with the assignor in a writing signed by the debtor of the receivable not to raise against the assignee the defences and rights of set-off referred to in article 82.
2. An agreement under paragraph 1 of this article may be modified only by an agreement in a writing signed by the debtor of the receivable and its effectiveness as against the assignee is subject to article 84, paragraph 2.
3. The debtor of the receivable may not waive defences arising from fraudulent acts on the part of the assignee or based on the incapacity of the debtor of the receivable.

### Article 84. Modification of the original contract

1. An agreement concluded before notification of the assignment between the assignor and the debtor of the receivable that affects the assignee's rights is effective as against the assignee, and the assignee acquires corresponding rights.
2. An agreement concluded after notification of the assignment between the assignor and the debtor of the receivable that affects the assignee's rights is ineffective as against the assignee unless:
  - (a) The assignee consents to it; or
  - (b) The receivable is not fully earned by performance and either the modification is provided for in the original contract or, in the context of the original contract, a reasonable assignee would consent to the modification.
3. Paragraphs 1 and 2 of this article do not affect any right of the assignor or the assignee arising from breach of an agreement between them.

### Article 85. Recovery of payments made by the debtor of the receivable

1. The failure of the assignor to perform the original contract does not entitle the debtor of the receivable to recover from the assignee a sum paid by the debtor of the receivable to the assignor or the assignee.
2. Paragraph 1 of this article does not affect any rights that the debtor of the receivable may have against the assignor under other law.

*[Note to the Working Group: The Working Group may wish to note that the commentary will clarify that articles 79-85 are based on recommendations 117-123 of the Secured Transactions Guide, which in turn are based articles 15-21 of the United Nations Assignment Convention. Paragraph 2 of article 85 (which is based on recommendation 123 of the Secured Transactions Guide and article 21 of the United Nations Assignment Convention has been added to clarify that this article is not intended to deprive the debtor of the receivable of any rights it might have under other law to seek recovery of payments from its contractual partner, that is, the assignor.]*

### Article 86. Third-party effectiveness of a security right in a right that secures payment of a receivable

1. If a security right in a receivable is effective against third parties, such third-party effectiveness extends to any personal or property right that secures payment or other performance of the receivable without further action by either the grantor or the secured creditor.
2. If the personal or property right referred to in paragraph 1 of this article is an independent undertaking, the third-party effectiveness of the security right automatically extends to the right to receive the proceeds under the independent undertaking.
- [3. This article does not affect a right in immovable property that under other law is transferable separately from the receivable that it may secure.]<sup>2</sup>

*[Note to the Working Group: The Working Group may wish to note that article 86 is based on recommendation 48 of the Secured Transactions Guide (references to negotiable instruments have been deleted since this section of the draft Model Law deals with receivables but these articles are made applicable to negotiable instruments-see footnote 3). If the Working Group decides that reference should be made to a secured creditor "acquiring the benefit of", rather than to the creation or third-party effectiveness of a security right "extending to", a personal or property right securing payment or other performance of a receivable, it may wish to consider whether article 86 should be subsumed into article 75.]*

<sup>2</sup> An enacting State may wish to consider implementing this paragraph only if it has a law such as the one described therein.

**Article 87. Application of the chapter on enforcement to an outright transfer of a receivable**

The provisions of chapter VI of this Law do not apply to the collection or other enforcement of a receivable assigned by an outright transfer with the exception of:

- (a) Articles 56 and 57 in the case of an outright transfer with recourse; and
- (b) Articles 88 and 89.

**Article 88. Enforcement**

1. Subject to articles 79-86:
  - (a) In the case of a receivable assigned by an outright transfer, the assignee has the right to collect or otherwise enforce the receivable;
  - (b) In the case of a receivable assigned otherwise than by an outright transfer, the assignee has the right to collect or otherwise enforce the receivable after default, or before default with the agreement of the assignor.
2. The assignee's right to collect or otherwise enforce a receivable includes the right to collect or otherwise enforce any personal or property right that secures payment of the receivable.

**Article 89. Distribution of proceeds of disposition**

In the case of collection or other enforcement of a receivable, the enforcing secured creditor must:

- (a) Apply the net proceeds of its enforcement after deducting costs of enforcement to the secured obligation; and
- (b) Pay any surplus remaining to the competing claimants that, prior to any distribution of the surplus, notified the enforcing secured creditor of their claims, to the extent of those claims, and remit any balance remaining to the grantor.

*[Note to the Working Group: The Working Group may wish to note that articles 87-89 are based on recommendations 167-169 and 172 of the Secured Transactions Guide.]*

**Article 90. Law applicable to the relationship between the debtor of the receivable and the assignee**

The law applicable to a receivable also is the law applicable to:

- (a) The relationship between the debtor of the receivable and the assignee of the receivable;
- (b) The conditions under which an assignment of the receivable may be invoked against the debtor of the receivable, including whether an anti-assignment agreement may be asserted by the debtor of the receivable; and
- (c) Whether the obligations of the debtor of the receivable, have been discharged.

*[Note to the Working Group: The Working Group may wish to note that article 90 is based on recommendation 217 of the Secured Transactions Guide (references to negotiable instruments and negotiable documents have been deleted since this section of the draft Model Law deals with receivables).]*

**Section II. Negotiable instruments<sup>3</sup>****Article 91. Rights and obligations of the obligor**

A secured creditor's rights under a negotiable instrument as against a person obligated on the negotiable instrument are subject to the law relating to negotiable instruments.

<sup>3</sup> Articles 75, 86, 89 and 90 of section I on receivables apply also to negotiable instruments.

### Article 92. Priority

1. [Except as provided in paragraph 2 of this article], a security right in a negotiable instrument that is made effective against third parties by possession of the instrument has priority as against a security right in a negotiable instrument that is made effective against third parties by registration.
2. A security right in a negotiable instrument that is made effective against third parties by registration is subordinate to the rights of a secured creditor, buyer or other consensual transferee that:
  - (a) Qualifies as a protected holder under the law relating to negotiable instruments; or
  - (b) Takes possession of the negotiable instrument and gives value in good faith and without knowledge that the transfer is in violation of the rights of the secured creditor under the security agreement.

*[Note to the Working Group: The Working Group may wish to note that article 91 is based on recommendation 124 of the Secured Transactions Guide, and article 92 on recommendations 101 and 102. The words added at the beginning of paragraph 1 of this article within square brackets are intended to avoid a potential inconsistency between paragraph 1 (possession beats the only other possible method, that is, registration) and paragraph 2 (possession does not beat protected holder or a secured creditor, buyer or other consensual transferee that takes in good faith).]*

### Article 93. Law applicable to third-party effectiveness in certain cases

If the State in which the grantor is located recognizes registration as a method of achieving effectiveness against third parties of a security right in a negotiable instrument, the law of the State in which the grantor is located is the law applicable to the issue of whether effectiveness against third parties has been achieved by registration under the laws of that State.

*[Note to the Working Group: The Working Group may wish to note that article 93 is based on recommendation 211 of the Secured Transactions Guide.]*

## Section III. Rights to payment of funds credited to a bank account<sup>4</sup>

### Article 94. Creation

Subject to article 95, a security right in a right to payment of funds credited to a bank account is effective notwithstanding an agreement between the grantor and the depositary bank limiting in any way the grantor's right to create the security right.

### Article 95. Rights and obligations of a depositary bank

1. The creation of a security right in a right to payment of funds credited to a bank account does not affect the rights and obligations of a depositary bank without its consent.
2. Any rights of set-off that a depositary bank may have under other law are not impaired by reason of any security right that the bank may have in a right to payment of funds credited to a bank account maintained with the depositary bank.
3. With respect to a bank account maintained with it, a depositary bank is not obligated:
  - (a) To pay any person other than a person that has control with respect to funds credited to a bank account;
  - (b) To respond to requests for information about whether it has entered into a control agreement with a grantor maintaining a bank account with the depositary bank and a secured

<sup>4</sup> Article 93 of section II on negotiable instruments applies also to rights to payment of funds credited to a bank account

creditor or acquired a security right in its own favour and whether the grantor retains the right to dispose of the funds credited in the account; or

- (c) To enter into a control agreement.

*[Note to the Working Group: The Working Group may wish to consider whether a definition of the term “control agreement” should be included in article 2 along the following lines: “‘Control agreement’ means an agreement between a depositary bank, a grantor and a secured creditor, evidenced by a signed writing, according to which the depositary bank has agreed to follow instructions from the secured creditor with respect to the payment of funds credited to the bank account without further consent from the grantor (see Terminology of the Secured Transactions Guide).]*

#### **Article 96. Third-party effectiveness**

A security right in a right to payment of funds credited to a bank account may be made effective against third parties by registration or by the secured creditor obtaining control.

#### **Article 97. Priority**

1. A security right in a right to payment of funds credited to a bank account that is made effective against third parties by control has priority as against a competing security right that is made effective against third parties by registration.
2. Priority among secured creditors that obtain a control agreement with the grantor and the depositary bank is determined according to the order in which the control agreements are concluded.
3. A security right of a secured creditor that obtains control automatically has priority as against a security right made effective against third parties by a control agreement with the depositary bank, except a security right of a secured creditor that obtains control by becoming the account holder.
4. A depositary bank’s right under other law to set off obligations owed to it by the grantor against the grantor’s right to payment of funds credited to a bank account maintained with the depositary bank has priority as against a security right in the right to payment of funds credited to the bank account, except a security right of a secured creditor that obtains control by becoming the account holder.
5. A transferee of funds from a bank account pursuant to a transfer initiated by the grantor takes free of a security right in the right to payment of funds credited to the bank account, unless the transferee has knowledge that the transfer violates the rights of the secured creditor under the security agreement.
6. This article does not adversely affect the rights under other law of transferees of funds from bank accounts.

*[Note to the Working Group: The Working Group may wish to consider whether a definition of the term “control” should be included in article 2 along the following lines: “‘Control’ with respect to a right to payment of funds credited to a bank account exists: (a) Automatically upon the creation of a security right if the depositary bank is the secured creditor; (b) If the depositary bank has concluded a control agreement with the grantor and the secured creditor; or (c) If the secured creditor is the account holder (see Terminology of the Secured Transactions Guide).]*

#### **Article 98. Enforcement**

1. After default or before default with the agreement of the grantor, a secured creditor with a security right in a right to payment of funds credited to a bank account is entitled, subject to article 94., to collect or otherwise enforce its right to payment of the funds.
2. A secured creditor that has control is entitled, subject to article 94, to enforce its security right without having to apply to a court or other authority.
3. A secured creditor that does not have control is entitled, subject to article 94, to collect or otherwise enforce the security right in the right to payment of funds credited to a bank

account against the depositary bank only pursuant to a court order, unless the depositary bank agrees otherwise.

#### **Article 99. Law applicable**

1. Subject to article 94, the law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in a right to payment of funds credited to a bank account, as well as rights and duties of the depositary bank with respect to the security right, is

##### **Alternative A<sup>5</sup>**

The law of the State in which the bank with which the account is maintained has its place of business.

2. If the bank has places of business in more than one State, reference should be made to the place where the branch maintaining the account is located.

##### **Alternative B**

The law of the State expressly stated in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that another law is applicable to all such issues, that other law.

2. The law of the State determined pursuant to paragraph 1 of this article applies only if the depositary bank has, at the time of the conclusion of the account agreement, an office in that State that is engaged in the regular activity of maintaining bank accounts.

3. If the applicable law is not determined pursuant to paragraph 1 or 2 of this article, the applicable law is to be determined pursuant to default rules based on article 5 of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary.

*[Note to the Working Group: The Working Group may wish to note that article 95 is based on recommendation 26 of the Secured Transactions Guide, article 96 on recommendation 49, article 97 on recommendations 103-106, article 98 on recommendations 173-175, and article 99. The Working Group may wish to consider whether, instead of referring to article 5 of The Hague Securities Convention, paragraph 3 should set forth the rule contained in that article.]*

### **Section IV. Money**

#### **Article 100. Priority of a security right in money**

1. A person that obtains possession of money that is subject to a security right takes the money free of the security right, unless that person has knowledge that the transfer violates the rights of the secured creditor under the security agreement.

2. This article does not adversely affect the rights of holders of money under other law.

### **Section V. Negotiable documents and tangible assets covered by a negotiable document<sup>6</sup>**

#### **Article 101. Extension of a security right in a negotiable document to the tangible asset covered by the negotiable document**

A security right in a negotiable document extends to the tangible asset covered by the document, provided that the issuer or its representative is in possession of the asset at the time the security right in the document is created.

<sup>5</sup> A State may adopt alternative A or alternative B of this article.

<sup>6</sup> Article 90 of section I on receivables applies also to negotiable documents.



### **Article 102. Rights and obligations of the issuer of a negotiable document**

A secured creditor's rights under a negotiable document are, as against the issuer or any other person obligated on the negotiable document, subject to the law relating to negotiable documents.

### **Article 103. Third-party effectiveness**

1. A security right in a negotiable document may be made effective against third parties by registration or by the secured creditor's possession of the document.
2. If a security right in a negotiable document is effective against third parties, the corresponding security right in the asset covered by the document is also effective against third parties.
3. During the period when a negotiable document covers an asset, a security right in the asset may be made effective against third parties by the secured creditor's possession of the document.
4. A security right in a negotiable document that was made effective against third parties by the secured creditor's possession of the document remains effective against third parties for [a short period of time to be specified by the enacting State] after the negotiable document has been relinquished to the grantor or other person for the purpose of ultimate sale or exchange, loading or unloading, or otherwise dealing with the assets covered by the negotiable document.

### **Article 104. Priority**

1. A security right in a negotiable document and the tangible assets covered thereby is subordinate to any superior rights acquired by a transferee of the document under the law relating to negotiable documents.
2. Subject to paragraph 3 of this article, a security right in a tangible asset made effective against third parties by possession of a negotiable document has priority as against a competing security right made effective against third parties by registration or by possession of the tangible asset.
3. A security right in a tangible asset other than inventory made effective against third parties by registration or by possession of the tangible asset has priority over a security right made effective against third parties by possession of a negotiable document if the security right was made effective against third parties before the earlier of:
  - (a) The time that the asset became covered by the negotiable document; and
  - (b) The time of conclusion of an agreement between the grantor and the secured creditor in possession of the negotiable document providing for the asset to be covered by a negotiable document so long as the asset became so covered within [a short period of time to be specified by the enacting State] from the date of the agreement.

### **Article 105. Enforcement**

After default or before default with the agreement of the grantor, subject to article 102, the secured creditor has the right to enforce a security right in a negotiable document or a tangible asset covered by the document.

*[Note to the Working Group: The Working Group may wish to note that article 101 is based on recommendation 28 of the Secured Transactions Guide, article 102 on recommendation 130, article 103 on recommendations 51-53, article 104 on recommendations 108 and 109, and article 105 on recommendation 177.]*

## [Section VI. Intellectual property

### **Article 106. Security rights in tangible assets with respect to which intellectual property is used**

In the case of a tangible asset with respect to which intellectual property is used, a security right in the tangible asset does not extend to the intellectual property and a security right in the intellectual property does not extend to the tangible asset.

### **Article 107. Impact of a transfer of encumbered intellectual property on the effectiveness of the registration**

The registration of a notice of a security right in intellectual property in the general security rights registry remains effective notwithstanding a transfer of the encumbered intellectual property.

### **Article 108. Priority of rights of certain licensees of intellectual property**

Article 47, paragraph 6 applies to the rights of a secured creditor under this Law and does not affect the rights the secured creditor may have under the law relating to intellectual property.

### **Article 109. Right of the secured creditor to preserve the encumbered intellectual property**

The grantor and the secured creditor may agree that the secured creditor is entitled to take steps to preserve the encumbered intellectual property.

### **Article 110. Application of acquisition security right provisions to security rights in intellectual property**

1. The provisions on an acquisition security right in a tangible asset also apply to an acquisition security right in intellectual property or a licence of intellectual property.
2. For the purpose of applying these provisions:
  - (a) Intellectual property or a licence of intellectual property:
    - (i) Held by the grantor for sale or licence in the ordinary course of the grantor's business is treated as inventory; and
    - (ii) Used or intended to be used by the grantor for personal, family or household purposes is treated as consumer goods; and
  - (b) Any reference to:
    - (i) Possession of the encumbered asset by the secured creditor does not apply;
    - (ii) The time of possession of the encumbered asset by the grantor refers to the time the grantor acquires the encumbered intellectual property or licence of intellectual property; and
    - (iii) The time of the delivery of the encumbered asset to the grantor refers to the time the grantor acquires the encumbered intellectual property or licence of intellectual property.

### **Article 111. Law applicable to a security right in intellectual property**

1. The law applicable to the creation, effectiveness against third parties and priority of a security right in intellectual property is the law of the State in which the intellectual property is protected.
2. A security right in intellectual property may also be created under the law of the State in which the grantor is located and may also be made effective under that law against third parties other than another secured creditor, a transferee or a licensee.
3. The law applicable to the enforcement of a security right in intellectual property is the law of the State in which the grantor is located.]

[*Note to the Working Group: The Working Group may wish to note that articles 105-110, which appear within square brackets for the Working Group to determine whether they should be included in the draft Model Law, are based on recommendations 243-248 of the Intellectual Property Supplement.*]

## VIII. Transition

[*Note to the Working Group: The Working Group may wish to test transition rules against the following situations: (a) moving from one registration system to another; (b) moving from no registration system to a new registration system; (c) changing the applicable law (e.g. where there is no registry under one but not under the new applicable law or from a law that does not treat a retention-of-title right as a security right but the new law does).*]

### Article 112. General

1. This Law comes into force on [a date to be specified by the enacting State] [...] months after a date to be specified by the enacting State.
2. For the purposes of this chapter:
  - (a) “Effective date” refers to the date on which this Law comes into force;
  - (b) “Prior law” refers to the law of the enacting State that was in force immediately prior to the effective date of this Law; and
  - (c) “Prior security right” means a right created by a security agreement or other transaction concluded before the effective date of this Law that is a security right within the scope of this Law and to which this Law would have applied if it had been in force when the security agreement or other transaction was concluded.
3. Subject to paragraph 4 of this article, this Law applies to all security rights within its scope, including prior security rights, except to the extent that this chapter provides for the continued application of prior law.
4. This Law does not apply to prior security rights that were validly terminated under prior law before the effective date.

### Article 113. Actions commenced before the effective date

Prior law applies to:

- (a) Matters that are the subject of litigation or alternative binding dispute resolution proceedings that were commenced before the effective date; and
- (b) The enforcement of a security right if the secured creditor commenced enforcement before the effective date.

### Article 114. Creation of a security right

A prior security right created in accordance with prior law remains effective under this Law notwithstanding that it does not comply with the creation requirements of this Law.

### Article 115. Third-party effectiveness of a security right

1. A prior security right that was made effective against third parties before the effective date in accordance with prior law remains effective against third parties under this Law until the earlier of:
  - (a) The time it would have ceased to be effective against third parties under prior law; and
  - (b) The expiration of [a transition period, such as six months, to be specified by the enacting State] after the effective date.

2. After the period of time referred to in paragraph 1 of this article, a security right remains effective against third parties if the third-party effectiveness requirements of this Law are satisfied.
3. If the third-party effectiveness requirements of this Law are satisfied before third-party effectiveness would have ceased under paragraph 1 of this article, the prior security right remains continuously effective against third parties for the purposes of this Law.

**Article 116. Priority of a security right**

1. The time to be used for determining priority of a prior security right is the time it was made effective against third parties or became the subject of a registered notice under the prior law.
2. The priority of a prior security right is determined by prior law if:
  - (a) The security right and the rights of all competing claimants arose before the effective date of this Law; and
  - (b) The priority status of none of these rights has changed since the effective date of this Law.
3. The priority status of a security right has changed if:
  - (a) It was effective against third parties on the effective date of this Law as provided in paragraph 1 of article 115 and ceased to be effective against third parties as provided in paragraph 2 of article 115; or
  - (b) It was not effective against third parties under prior law on the effective date and was made effective against third parties under this Law.

## (A/CN.9/WG.VI/WP.57/Add.4) (Original: English)

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## Chapter VII. Asset-specific rules

*[Note to the Working Group: The Working Group may wish to note that, to emphasize that, depending on whether it already has modern asset-specific rules, a State may implement all, some or none of the asset-specific rules, the Secured Transactions Guide presents them in a separate section in each chapter. For the same reason but also to give States an overview of all asset-specific rules, they are all included in chapter VII of this version of the draft Model Law. If the Working Group decides that asset-specific rules should be included in the draft Model Law, the Working Group may wish to consider whether the way in which this material is currently presented (that is, in an asset-specific chapter) is the best way. Another alternative might be to keep the asset-specific rules, as in the Secured Transactions Guide, in a separate section of each relevant chapter (that is, creation, third-party effectiveness, priority, etc.). Yet another alternative might be to incorporate the asset-specific rules into the general rules in each relevant chapter. In any case, the way in which this material is presented would be a “recommended” approach but not the only approach. In other words, it would be up to each enacting State to decide how to implement the provisions of the draft Model Law, such as, for example, in a single statute on secured transactions, in one chapter of a single statute (civil or commercial code or other statute), in various parts of a statute or in various statutes.]*

## Annex I. Acquisition financing<sup>7</sup>

### Option A: Unitary approach

*[Note to the Working Group: The Working Group may wish to note that, as noted in footnote 1 (which may be retained in the final text of the Model Law), the provisions on acquisition financing are presented in an annex to emphasize that a State may implement them either by including them in a separate chapter (as in the Secured Transactions Guide) or by integrating them into the relevant chapters. The Working Group may wish to consider whether this is the best way to present the provisions on acquisition financing, or whether the provisions on acquisition financing should be included in a separate chapter or integrated into the relevant chapter of the draft Model Law (perhaps at the end to avoid the numbering problem arising as a result of the fact that the number of articles of each approach is different).]*

<sup>7</sup> The provisions on acquisition financing are a necessary part of the draft Model Law. They are presented in an annex to emphasize that a State may implement them either as a separate chapter (in which case the articles outside the chapter on acquisition financing would be generally applicable except to the extent modified by the articles in the chapter on acquisition financing) or by integrating them into the relevant chapters of the draft Model Law. A State may adopt option A (unitary approach) or option B (non-unitary approach).

### Definitions

(a) “Acquisition secured creditor” means a secured creditor that has an acquisition security right. The term includes a retention-of-title seller or financial lessor;

(b) “Acquisition security right” means a security right in a tangible asset [or intellectual property] that secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit otherwise provided to enable the grantor to acquire the asset. The term includes a retention-of-title right or a financial lease right;

(c) The term “security right” includes an acquisition security right.<sup>8</sup>

*[Note to the Working Group: If the Working Group decides that the draft Model Law should apply to security rights in intellectual property, it may wish to retain the bracketed text in the definition of the term “acquisition security right”. The Working Group may also wish to consider replacing the words “to enable” with the words “that enable” in that definition to ensure that a security right qualifies as an acquisition security right only if credit provided for the acquisition of an asset is in fact used for that purpose.]*

### Article 1. Third-party effectiveness of an acquisition security right in consumer goods

An acquisition security right in consumer goods is effective against third parties upon its creation.

### Article 2. Priority of an acquisition security right<sup>9</sup>

#### Alternative A

Except as provided in article 54:

(a) An acquisition security right in a tangible asset other than inventory or consumer goods has priority as against a competing non-acquisition security right created by the grantor, provided that:

(i) The acquisition secured creditor retains possession of the asset; or

(ii) A notice with respect to the acquisition security right is registered in the general security rights registry not later than [a short time period, such as thirty days, to be specified by the enacting States] after the grantor obtains possession of the asset;

(b) An acquisition security right in inventory has priority as against a competing non-acquisition security right created by the grantor, provided that:

(i) The acquisition secured creditor retains possession of the inventory; or

(ii) Before delivery of the inventory to the grantor:

a. A notice with respect to the acquisition security right is registered in the general security rights registry; and

b. Another notice is received by a secured creditor with an earlier-registered non-acquisition security right created by the grantor in inventory of the same kind, stating that the acquisition secured creditor has or intends to acquire an acquisition security right and describing the inventory sufficiently to enable the non-acquisition secured creditor to identify the inventory that is the object of the acquisition security right;

(c) A notice, sent pursuant to subparagraph (b) (ii) b. of this article, may cover acquisition security rights under multiple transactions between the same parties without the need to identify each transaction and is sufficient only for security rights in tangible assets of which the grantor obtains possession within a period of [a period of time, such as five years, to be specified by the enacting State] after the notice is [sent] [received]; and

<sup>8</sup> A State that decides to follow a unitary approach may wish to include this wording in article 2, subparagraph (cc).

<sup>9</sup> A State may adopt alternative A or alternative B of this article.

(d) An acquisition security right in consumer goods has priority as against a competing non-acquisition security right created by the grantor.

### **Alternative B**

Except as provided in article 54:

(a) An acquisition security right in a tangible asset other than consumer goods has priority as against a competing non-acquisition security right created by the grantor, even if a notice of that security right was registered in the general security rights registry before registration of a notice of the acquisition security right, provided that:

- (i) The acquisition secured creditor retains possession of the asset; or
- (ii) A notice with respect to the acquisition security right is registered in the general security rights registry not later than [a short time period, such as thirty days, to be specified by the enacting State] after the grantor obtains possession of the asset; and

(b) An acquisition security right in consumer goods has priority as against a competing non-acquisition security right created by the grantor.

*[Note to the Working Group: The Working Group may wish to note that subparagraph (b) (ii) b. of this article refers to a notice received by an earlier registered inventory financier and consider whether this formulation is better than the formulation of the same subparagraph in recommendation 180 of the Secured Transactions Guide on which this subparagraph is based and which referred to an earlier registered inventory financier being “notified”. The Working Group may also wish to consider that the receipt rule should apply to any notice sent to a person under the draft Model Law (e.g., article 5, Alternative A, paragraph 3 below).]*

### **Article 3. Priority among acquisition security rights**

1. Subject to paragraph 2 of this article, the priority between competing acquisition security rights is determined according to the general priority rules in chapter V.
2. An acquisition security right of a retention-of-title seller that was made effective against third parties within the period specified in article 3, subparagraph (a) (ii), has priority as against a competing acquisition security right of a secured creditor other than a retention-of-title seller.

### **Article 4. Priority of an acquisition security right as against the right of a judgement creditor**

Notwithstanding article 50, an acquisition security right that is made effective against third parties within the period specified in article 3 subparagraph (a) (ii), has priority as against the rights of a judgement creditor.

### **Article 5. Priority of an acquisition security right in proceeds of a tangible asset<sup>10</sup>**

#### **Alternative A**

1. The priority of an acquisition security right in proceeds of a tangible asset other than inventory or consumer goods extends to the proceeds of that asset.
2. The priority of an acquisition security right in inventory extends to the proceeds of that inventory, except where the proceeds take the form of receivables, negotiable instruments, rights to payment of funds credited to a bank account or rights to receive the proceeds under an independent undertaking.
3. The priority of an acquisition security right in proceeds under paragraph 1 or 2 of this article is conditional on secured creditors receiving a notice from the acquisition secured creditor stating that, before the proceeds arose, it registered a notice with respect to a security right in assets of the same kind as the proceeds.

<sup>10</sup> A State may adopt alternative A of this article, if it adopts alternative A of article 2, or alternative B of this article if it adopts alternative B of article 2.



## Alternative B

The priority of an acquisition security right in a tangible asset does not extend to the proceeds.

*[Note to the Working Group: The Working Group may wish to note that article 5 addresses the question whether an acquisition security right in proceeds has the special priority of an acquisition security right or the general priority of a non-acquisition security right. The Working Group may wish to consider whether an article should be included in the draft Model Law (perhaps in article 53) to explicitly address the question of the priority of a security right in an asset extending to the proceeds of that asset. The Working Group may also wish to note that no article has been included to deal with the application of these special priority rules in the case of insolvency (recommendation 186) as it goes without saying that insolvency law operates against the background of secured transactions law and that there is nothing in these articles to imply otherwise.]*

## Option B: Non-unitary approach

*[Note to the Working Group: The Working Group may wish to note that recommendations 187 (methods of acquisition financing) and 188 (equivalence of a retention-of-title right and a financial lease right to an acquisition security right) have not been reflected in an article of the draft Model Law as they do not seem to be suitable for a legislative text. A State enacting the non-unitary approach would instead incorporate the text of the unitary approach above into its law, while clarifying that it does not apply to creditor's rights that take the form of retention-of-title or financial lease rights and go on to also incorporate into its law the provisions below on retention-of-title and financial lease rights.]*

### Definitions

(a) “Financial lease right” means a lessor’s right in a tangible asset (other than a negotiable instrument or negotiable document) that is the object of a lease agreement under which, at the end of the term of the lease:

- (i) The lessee automatically becomes the owner of the asset that is the object of the lease;
- (ii) The lessee may acquire ownership of the asset by paying no more than a nominal price; or
- (iii) The asset has no more than a nominal residual value.

The term includes a hire-purchase agreement, even if not nominally referred to as a lease, provided that it meets the requirements of subparagraph (i), (ii) or (iii);

(b) “Retention-of-title right” means a seller’s right in a tangible asset (other than a negotiable instrument or negotiable document) pursuant to an arrangement with the buyer by which ownership of the asset is not transferred (or is not transferred irrevocably) from the seller to the buyer until the unpaid portion of the purchase price is paid; and

(c) The terms “security right” and “acquisition security right” do not include a retention-of-title or financial lease right.<sup>11</sup>

*[Note to the Working Group: The Working Group may wish to consider whether the right of the lessee to buy the asset at a nominal price should exist at any time and not only at the end of the lease as provided in subparagraph (a)(ii).]*

### Article 1. Right of buyer or lessee to create a security right

1. A buyer or lessee may create a security right in a tangible asset that is the object of a retention-of-title right or a financial lease right.

<sup>11</sup> A State that decides to follow a non-unitary approach may wish to include this wording in the definitions of “security right” and “acquisition security right”.

2. The maximum amount for which the security right may be enforced is the value of the asset in excess of the amount owing to the seller or financial lessor at the time of enforcement.

**Article 2. Effectiveness of a retention-of-title right or a financial lease right<sup>12</sup>**

**Alternative A**

1. A retention-of-title right or a financial lease right in tangible assets other than inventory or consumer goods is effective only if the sale or lease agreement is concluded in or evidenced by a writing that meets the requirements of article 6 of this Law; and
  - (a) The seller or lessor retains possession of the asset; or
  - (b) A notice relating to the right is registered in the general security rights registry not later than [a short time period, such as thirty days, to be specified by the enacting State] days after the buyer or lessee obtains possession of the asset.
2. A retention-of-title right or a financial lease right in inventory is effective against third parties only if:
  - (a) The seller or lessor retains possession of the inventory; or
  - (b) Before delivery of the inventory to the buyer or lessee:
    - (i) A notice relating to the right is registered in the general security rights registry; and
    - (ii) Another notice is sent by the seller or lessor to a secured creditor with an earlier registered non-acquisition security right created by the buyer or lessee in inventory of the same kind, stating that the seller or lessor has or intends to acquire a retention-of-title right or a financial lease right and describing the inventory sufficiently to enable the secured creditor to identify the inventory that is the object of the retention-of-title right or the financial lease right.
3. A retention-of-title right or a financial lease right in consumer goods is effective against third parties upon conclusion of the sale or lease agreement.
4. A notice sent pursuant to subparagraph 2 (b) (ii) of this article may cover retention-of-title rights and financial lease rights under multiple transactions between the same parties without the need to identify each transaction. The notice is effective only for rights in tangible assets of which the buyer or lessee obtains possession within a period of [a period of time, such as five years, to be specified] years after the notice is [sent] [received].

**Alternative B**

1. A retention-of-title right or a financial lease right in a tangible asset other than consumer goods is effective only if the sale or lease agreement is concluded in or evidenced by a writing that meets the requirements of article 6 of this Law and:
  - (a) The seller or lessor retains possession of the asset; or
  - (b) A notice relating to the right is registered in the general security rights registry not later than [a short time period, such as thirty days, to be specified by the enacting State] after the buyer or lessee obtains possession of the asset.
2. A retention-of-title right or a financial lease right in consumer goods is effective against third parties upon conclusion of the sale or lease agreement.

*[Note to the Working Group: The Working Group may wish to note that this article deals with effectiveness of a retention-of-title or financial lease right against all, as States that may wish to follow the non-unitary approach will normally know only the erga omnes effect of a retention-of-title or financial lease right. The Working Group may also wish to note that the thrust of recommendation 189 of the Secured Transactions Guide has been included in paragraph 1 of this article, slightly revised to refer to the contents of a security agreement under article 6 of the draft Model Law. The Working Group may wish to consider*

<sup>12</sup> A State may adopt alternative A or alternative B of this article.

*whether this article or the commentary should clarify that, if a retention-of-title right is not effective, ownership passes to the buyer (without the retention of title).]*

### **Article 3. One registration sufficient**

1. Registration of a single notice in the general security rights registry is sufficient with respect to a retention-of-title right or a financial lease right under multiple transactions between the same parties, whether concluded before or after the registration, which involve tangible assets that fall within the description contained in the notice.
2. The provisions of this Law on the registry system apply to the registration of a retention-of-title right and a financial lease right.

### **Article 4. Effect of failure to achieve the timely effectiveness of a retention-of-title right or a financial lease right**

If a retention-of-title right or a financial lease right in a tangible asset is not made effective within [the time period provided in Alternative A of article 2, subparagraph 1 (b), or Alternative B of article 2, subparagraph 1 (b)], upon expiry of that period, ownership of the asset passes to the buyer or lessee, and the seller or lessor has a security right in the asset subject to the provisions of this Law applicable to security rights.

*[Note to the Working Group: The Working Group may wish to note that this article has been revised on the basis of explanations given in the commentary (paragraph 181) of chapter IX of the Secured Transactions Guide.]*

### **Article 5. Existence of a security right in proceeds of a tangible asset subject to a retention-of-title right or financial lease right**

A seller or lessor with a retention-of-title right or financial lease right in a tangible asset has a security right in any proceeds of the asset.

### **Article 6. Third-party effectiveness of a security right in proceeds of a tangible asset subject to a retention-of-title right or financial lease right**

1. A security right in proceeds referred to in article 5 is effective against third parties only if a description of the proceeds in conformity with article 32 is included in the registered notice or the proceeds consist of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account.
2. In a case not within paragraph 1 of this article, the security right in the proceeds is effective against third parties for [a short period of time, such as thirty days, to be specified by the enacting State] after the proceeds arise and continuously thereafter, if it was made effective against third parties by one of the methods referred to in chapter III of this Law before the expiry of that time period.

### **Article 7. Priority of a security right in proceeds of a tangible asset subject to a retention-of-title right or financial lease right<sup>13</sup>**

#### **Alternative A**

1. If a retention-of-title right or financial lease right in a tangible asset other than inventory or consumer goods is effective, the security right in proceeds referred to in article 5 has priority as against another security right in the same asset.
2. If a retention-of-title right or financial lease right in inventory is effective, the seller's or lessor's security right in the proceeds of the inventory referred to in article 5 has priority over any other security right in the inventory, except where the proceeds take the form of receivables, negotiable instruments, rights to payment of funds credited to a bank account and rights to receive the proceeds under an independent undertaking.
3. The priority referred to in paragraph 2 of this article is conditional on secured creditors that have registered a notice with respect to a security right in assets of the same kind as the

<sup>13</sup> A State may adopt alternative A of this article, if it adopts alternative A of article 5, or alternative B of this article, if it adopts alternative B of article 5.

proceeds receiving a notice from the seller or lessor stating that, before the proceeds arose, the seller or lessor acquired a security right in the proceeds.

### **Alternative B**

If a retention-of-title right or financial lease right in a tangible asset is effective, the priority of the security right in the proceeds of that asset referred to in article 5 is determined on the basis of the general rules of chapter V of this Law.

### **Article 8. Enforcement of a retention-of-title right or a financial lease right**

1. Chapter VI of this Law applies to the enforcement of a retention-of-title right or a financial lease right [the enacting State may wish to specify any exceptions necessary to preserve the regime applicable to sales and financial leases].

*[Note to the Working Group: The Working Group may wish to note that the bracketed text is intended to draw the attention of States to the following issues: (a) the manner in which the seller or financial lessor may obtain possession of the asset; (b) whether the seller or financial lessor is required to dispose of the asset and, if so, how; (c) whether the seller or financial lessor may retain any surplus; and (d) whether the seller or financial lessor has a claim for any deficiency against the buyer or financial lessee. The Working Group may wish to consider whether these issues should be addressed instead in this article or in the commentary.]*

### **Article 9. Law applicable to a retention-of-title right or a financial lease right**

Chapter [enacting State to specify the number of the conflict-of-laws chapter] applies also to retention-of-title rights and financial lease rights.

### **Article 10. Retention-of-title right or financial lease right in insolvency proceedings<sup>14</sup>**

In the case of insolvency proceedings with respect to the debtor,

#### **Alternative A**

the provisions of this Law that apply to security rights apply also to retention-of-title rights and financial lease rights.

#### **Alternative B**

the provisions of [the law to be specified by the enacting State] that apply to ownership rights of third parties apply also to retention-of-title rights and financial lease rights.

*[Note to the Working Group: The Working Group may wish to consider whether this article should be retained or deleted and the matter addressed therein discussed in the commentary.]*

## **Annex II. Conflict of laws<sup>15</sup>**

*[Note to the Working Group: The Working Group may wish to note that, as explained in footnote 9 (which may be retained in the final text of the Model Law), the provisions of conflict of laws are presented in an annex to emphasize that a State may implement them as part of its secured transactions law (at the beginning or at the end of it) or incorporate them in its private international law statute (civil code or other law). The Working Group may wish to consider whether including the conflict-of-laws provisions in an annex to the draft*

<sup>14</sup> A State may adopt alternative A or alternative B of this article.

<sup>15</sup> The provisions on conflict of laws are a necessary part of the draft Model Law. They are presented in an annex to emphasize that a State may implement them as part of the secured transactions law (at the beginning or at the end of it) or as part of a separate law (civil code or other law).

*Model Law is the best way to present them or whether they should be included in a chapter of the draft Model Law.]*

## **Section I. General rules**

### **Article 1. Law applicable to the rights and obligations of the grantor and the secured creditor**

The law applicable to the mutual rights and obligations of the grantor and the secured creditor arising from their security agreement is the law chosen by them and, in the absence of a choice of law, by the law governing the security agreement.

### **Article 2. Law applicable to the creation, third-party effectiveness and priority of a security right in a tangible asset**

1. Except as provided in paragraphs 2 to 4 of this article, the law applicable to the creation, third-party effectiveness and priority of a security right in a tangible asset is the law of the State in which the asset is located.
2. The law applicable to the creation, third-party effectiveness and priority of a security right in a tangible asset of a type ordinarily used in more than one State is the law of the State in which the grantor is located.
3. If a security right in a tangible asset is subject to registration in a specialized registry or notation on a title certificate providing for registration or notation of a security right, the law applicable to the creation, third-party effectiveness and priority of a security right in a tangible asset is the law of the State under whose authority the registry is maintained or the title certificate is issued.
4. The law applicable to the priority of a security right in a tangible asset made effective against third parties by possession of a negotiable document as against a competing security right made effective against third parties by another method is the law of the State in which the document is located at the time when the secured creditor obtained possession of the document.

### **Article 3. Law applicable to the creation, third-party effectiveness and priority of a security right in an intangible asset**

The law applicable to the creation, effectiveness against third parties and priority of a security right in an intangible asset is the law of the State in which the grantor is located.

### **Article 4. Law applicable to the enforcement of a security right**

The law applicable to issues relating to the enforcement of a security right:

- (a) In a tangible asset is the law of the State where enforcement takes place; and
- (b) In an intangible asset is the law applicable to the priority of the security right.

### **Article 5. Law applicable to a security right in proceeds**

1. The law applicable to the creation of a security right in proceeds is the law applicable to the creation of the security right in the original encumbered asset from which the proceeds arose.
2. The law applicable to the third-party effectiveness and priority of a security right in proceeds is the law applicable to the third-party effectiveness and priority of a security right in an asset of the same kind as the proceeds.

### **Article 6. Meaning of “location” of the grantor**

1. For the purposes of chapter [the enacting State to specify the number of the conflict-of-laws chapter], the grantor is located in the State in which it has its place of business.
2. If the grantor has a place of business in more than one State, the grantor’s place of business is that place where the central administration of the grantor is exercised.

3. If the grantor does not have a place of business, reference is to be made to the habitual residence of the grantor.

#### **Article 7. Relevant time for determining location**

1. Except as provided in paragraph 2 of this article, references to the location of the assets or of the grantor in chapter [the enacting State to specify the number of the conflict-of-laws chapter] refer, for creation issues, to the location at the time of the putative creation of the security right and, for third-party effectiveness and priority issues, to the location at the time the issue arises.
2. If the rights of all competing claimants in an encumbered asset were created and made effective against third parties before a change in location of the asset or the grantor, references in chapter [the enacting State to specify the number of the conflict-of-laws chapter] to the location of the asset or of the grantor refer, with respect to third-party effectiveness and priority issues, to the location prior to the change in location.

#### **Article 8. Exclusion of renvoi**

A reference in chapter [the enacting State to specify the number of the conflict-of-laws chapter] to “the law” of another State as the law applicable to an issue refers to the law in force in that State other than its conflict-of-laws provisions.

#### **Article 9. Public policy and internationally mandatory rules**

1. The application of the law determined under the provisions of chapter [the enacting State to specify the number of the conflict-of-laws chapter] may be refused only if the effects of its application would be manifestly contrary to the public policy of the forum.
2. The provisions of chapter [the enacting State to specify the number of the conflict-of-laws chapter] do not prevent the application of those provisions of the law of the forum which, irrespective of conflict-of-laws provisions, must be applied even to international situations.
3. Paragraphs 1 and 2 of this article do not permit the application of the provisions of the law of the forum to the third-party effectiveness and priority of a security right.

#### **Article 10. Impact of commencement of insolvency proceedings on the law applicable to security rights**

1. Subject to paragraph 2 of this article, the commencement of insolvency proceedings does not displace the conflict-of-laws provisions that determine the law applicable to the creation, third-party effectiveness, priority and enforcement of a security right [and, if the enacting State adopts the non-unitary approach, a retention-of-title right and financial lease right].
2. The rule in paragraph 1 of this article is subject to the effects on such issues of the application of the insolvency law of the State in which insolvency proceedings are commenced to issues such as avoidance, treatment of secured creditors, ranking of claims or distribution of proceeds.

### **Section II. Special rules**

#### **Article 11. Law applicable to a security right in a tangible asset in transit or to be exported**

A security right in a tangible asset (other than a negotiable instrument) in transit or to be exported from the State in which it is located at the time of the creation of the security right may be created and made effective against third parties under the law of the State of the location of the asset at the time of creation as provided in article 2, paragraph 1, or, provided that the asset reaches that State within [a short period of time, such as thirty days, to be specified by the enacting State] after the time of creation of the security right, under the law of the State of its ultimate destination.

**Article 12. Law applicable to  
receivables arising from a sale, lease or  
security agreement relating to immovable property**

1. The law applicable to the creation, third-party effectiveness and priority of a security right in a receivable arising from a sale, lease or security agreement relating to immovable property is the law of the State in which the assignor is located.
2. Notwithstanding paragraph 1 of this article, the law applicable to a priority conflict involving the right of a competing claimant that is registered in an immovable property registry is the law of the State under whose authority the registry is maintained.
3. The rule in paragraph 2 of this article applies only if, according to the law of the State under whose authority the registry is maintained, registration is relevant to the priority of a security right in the receivable.

**Article 13. Law applicable to the third-party effectiveness of a  
security right in specified types of asset by registration**

If the State in which the grantor is located recognizes registration as a method of achieving effectiveness against third parties of a security right in a negotiable instrument or a right to payment of funds credited to a bank account, the law of that State is the law applicable to the issue whether third-party effectiveness has been achieved by registration under the laws of that State.

**Section III. Special rules for situations in which  
the applicable law is the law of a multi-unit State**

**Article 14. Law applicable in the case of multi-unit States**

1. If the law applicable to an issue is the law of a multi-unit State, subject to paragraph 3 of this article, references to the law of a multi-unit State are to the law of the relevant territorial unit and, to the extent applicable in that unit, to the law of the multi-unit State itself.
2. The relevant territorial unit referred to in paragraph 1 of this article is to be determined on the basis of the location of the grantor or of the encumbered asset, or otherwise under the provisions of chapter [the enacting State to specify the number of the conflict-of-laws chapter].
3. If the applicable law is that of a multi-unit State or one of its territorial units, the internal conflict-of laws provisions in force in the multi-unit State or territorial unit determine whether the substantive provisions of law of the multi-unit State or of a particular territorial unit of the multi-unit State apply.

## C. Report of the Working Group on Security Interests on the work of its twenty-fifth session (New York, 31 March-4 April 2014)

(A/CN.9/802)

[Original: English]

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### I. Introduction

1. At its present session, Working Group VI (Security Interests) continued its work on the preparation of a model law on secured transactions (the “draft Model Law”), pursuant to a decision taken by the Commission at its forty-fifth session (New York, 25 June-6 July 2012).<sup>16</sup> At that session, the Commission agreed that, upon its completion of the UNCITRAL Guide on the Implementation of a Security Rights Registry (the “Registry Guide”), the Working Group should undertake work to prepare a simple, short and concise model law on secured transactions based on the general recommendations of the UNCITRAL Legislative Guide on Secured Transactions (the “Secured Transactions Guide”) and consistent with all texts prepared by UNCITRAL on secured transactions, including the United Nations Convention on the Assignment of Receivables in International Trade (the “United Nations Assignment Convention”), the Supplement on Security Rights in Intellectual Property (the “Intellectual Property Supplement”) and the UNCITRAL Guide on the Implementation of a Security Rights Registry (the “Registry Guide”).<sup>17</sup> The Commission also agreed that, consistent with the Commission’s decision at its forty-third session, in 2010, the topic of security rights in non-intermediated securities, in the sense of securities other than those credited in a securities account, should continue to be retained on the future work programme for further consideration, on the basis of a note to be prepared by the Secretariat, which would set out all relevant issues so as to avoid any overlap or inconsistency with texts prepared by other organizations.

2. At its twenty-third session (New York, 8-12 April 2013), the Working Group had a general exchange of views on the basis of a note prepared by the Secretariat entitled “Draft Model Law on Secured Transactions” (A/CN.9/WG.VI/WP.55 and Add.1 to 4).

3. At its forty-sixth session (Vienna, 8-26 July 2013), the Commission noted that the Secretariat was in the course of preparing a revised version of the draft Model Law that would implement the mandate given by the Commission to the Working Group and facilitate

<sup>16</sup> *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 105.

<sup>17</sup> *Ibid.*



commercial finance transactions.<sup>18</sup> It was agreed that the preparation of the draft Model Law was an extremely important project to complement the work of the Commission in the area of security interests and provide urgently needed guidance to States as to how to implement the recommendations of the Secured Transactions Guide. It was also agreed that, in view of the importance of modern secured transactions law for the availability and the cost of credit, and the importance of credit for economic development, such guidance was extremely important and urgent to all States at a time of economic crisis but in particular to States with developing economies and economies in transition. In addition, it was stated that the scope of the draft Model Law should include all economically valuable assets.<sup>19</sup> After discussion, the Commission confirmed the mandate it had given to Working Group VI in 2012 (see para. 1 above).<sup>20</sup> The Commission also agreed that whether that work would include security interests in non-intermediated securities would be assessed at a future time.<sup>21</sup>

4. At its twenty-fourth session (Vienna, 2-6 December 2013), the Working Group continued its work based on a note by the Secretariat entitled “Draft Model Law on Secured Transactions” (A/CN.9/WG.VI/WP.57 and Add.1 and 2) and requested the Secretariat to revise the draft Model Law to reflect the deliberations and decisions of the Working Group (A/CN.9/796, para. 11).

## II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its twenty-fifth session in New York from 31 March to 4 April 2014. The session was attended by representatives of the following States members of the Working Group: Algeria, Armenia, Austria, Belarus, Brazil, Canada, Colombia, Ecuador, France, Germany, Honduras, Hungary, Indonesia, Iran (Islamic Republic of), Italy, Japan, Mexico, Nigeria, Pakistan, Panama, Paraguay, Philippines, Republic of Korea, Russian Federation, Spain, Switzerland, Thailand, Turkey and United States of America.

6. The session was attended by observers from the following States: Angola, Democratic Republic of the Congo, Ethiopia, Guatemala, Libya and Qatar. The session was also attended by an observer from the Holy See.

7. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: World Bank and World Intellectual Property Organization (WIPO);

(b) *Intergovernmental organizations*: Organization of American States (OAS); and

(c) *International non-governmental organizations invited by the Commission*: American Bar Association (ABA), Asociación Interamericana de Derecho Internacional Privado (ASADIP), Commercial Finance Association (CFA), European Communities Trade Mark Association (ECTA), European Law Students’ Association (ELSA), Forum for International Conciliation and Arbitration (FICACIC), Inter-American Bar Association (IABA), International Chamber of Commerce (ICC), International Insolvency Institute (III), Moot Alumni Association (MAA), National Law Centre for Inter-American Free Trade (NLCIFT) and New York City Bar Association (NYCIBAR).

8. The Working Group elected the following officers:

*Chairman*: Sr. Rodrigo LABARDINI FLORES (Mexico)

*Rapporteur*: Ms. Verena CAP (Austria)

9. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.58 (Annotated Provisional Agenda), A/CN.9/WG.VI/WP.57 Addenda 2 to 4 (Draft Model Law

<sup>18</sup> *Ibid.*, *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 192.

<sup>19</sup> *Ibid.*, para. 193.

<sup>20</sup> *Ibid.*, para. 194.

<sup>21</sup> *Ibid.*, para. 332.

on Secured Transactions), and A/CN.9/WG.VI/WP.59 and Addendum 1 (Draft Model Law on Secured Transactions).

10. The Working Group adopted the following agenda:
  1. Opening of the session and scheduling of meetings.
  2. Election of officers.
  3. Adoption of the agenda.
  4. Draft Model Law on Secured Transactions.
  5. Other business.
  6. Adoption of the report.

### III. Deliberations and decisions

11. The Working Group considered a note by the Secretariat entitled “Draft Model Law on Secured Transactions” (A/CN.9/WG.VI/WP.57 Add.2-4 and A/CN.9/WG.VI/WP.59 and Add.1). The deliberations and decisions of the Working Group are set forth below in chapter IV. The Secretariat was requested to revise the draft Model Law to reflect the deliberations and decisions of the Working Group.

## IV. Model Law on Secured Transactions

### A. Chapter IV. The registry system (A/CN.9/WG.VI/WP.59/Add.1)

12. Recalling its decision taken at its twenty-fourth session (see A/CN.9/796, para. 90), the Working Group considered chapter IV with a view to determining which articles should be included in the draft Model Law and which articles should be included in a draft model regulation to be set out in an annex to the draft Model Law (see A/CN.9/WG.VI/WP.59/Add.1). In that context, it was noted that, according to subparagraph 9 (m) of the Registry Guide and depending on the legislative policy and drafting technique of each enacting State, a regulation could include administrative rules or legal rules that would fit in secured transactions or other law.

13. At the outset, the Working Group agreed that guidance should be drawn from the Secured Transactions Guide and that similar issues should be dealt with in the same way. In addition, it was agreed that the preparation of registration-related rules was part of the mandate given to the Working Group by the Commission to prepare a simple, short and concise model law on secured transactions based on the recommendations of the Secured Transactions Guide and consistent with all texts prepared by UNCITRAL on secured transactions (see paras. 1 and 3 above). Moreover, it was widely felt that a distinction between legal issues that should be addressed in the draft Model Law and technical issues that should be addressed in a draft model regulation to be set out in an annex to the draft Model Law would make it easier for the Working Group to make progress with its work to prepare a simple, short and concise draft model law.

14. After discussion, it was agreed that the following articles should be retained in the draft Model Law as they dealt with important legal issues or issues that were normally addressed in secured transactions law: 19, 21, paragraphs 1 and 2, 23, paragraph 2, 24 to 28, 29, subparagraph (b), 36, 38, 40, paragraph 1 (which might be merged with art. 36), 41, paragraphs 2 and 3, 42, 43, paragraphs 1 and 3, 47, paragraphs 1 and 5-7 (while the time period referred to in para. 3 should be included in para. 5). In addition, it was agreed that all the other provisions in chapter IV dealt with technical registration-related issues and should thus be included in an annex to the draft Model Law together with an additional article to deal with registry fees. Moreover, it was agreed that the substantive content of all those articles would be considered at a future session.

**B. Chapter VI. Enforcement of a security right  
(A/CN.9/WG.VI/WP.57/Add.2)****Article 56. General standard of conduct in the context of enforcement and  
Article 57. Limitation on party autonomy**

15. The Working Group confirmed its decision that articles 56 and 57, paragraph 1, should be placed in the general provisions of the draft Model Law, while article 57, paragraph 2, should be retained in chapter VI (see A/CN.9/796, para. 101).

**Article 58. Liability**

16. The Working Group agreed that article 58 addressed an issue that was normally addressed in general law on liability and should thus be deleted from the draft Model Law.

**Article 59. Judicial or other relief for non-compliance**

17. The Working Group agreed that article 59 should be retained as it dealt with the right of the grantor, debtor or other interested person to seek court relief if the secured creditor failed to comply with its obligations either in the context of judicial or extrajudicial enforcement.

**Article 60. Expeditious judicial proceedings**

18. It was generally agreed that prolonged enforcement proceedings could have a negative impact on the availability and the cost of credit and that, therefore, the importance of expeditious judicial proceeding should be emphasized. However, differing views were expressed as to how that result could be achieved. One view was that article 60 should be retained in the draft Model Law. It was stated that such an approach would be consistent with the approach taken in recommendation 138 of the Secured Transactions Guide that properly emphasized the importance of expeditious proceedings. It was also observed that the guide to enactment should make reference to recent enactments of secured transactions law that incorporated such expedited proceedings. Moreover, it was suggested that the guide to enactment could refer even to alternative dispute resolution, including online dispute resolution. That suggestion was objected to. It was pointed out that alternative dispute resolution, including online dispute resolution, were matters that went beyond the mandate given to the Working Group and, in any case, States should be given the flexibility to choose which kind of expeditious proceedings they wished to adopt.

19. However, the prevailing view was that article 60 should be deleted and the matter addressed therein should be addressed in the guide to enactment with examples of expedited proceedings. It was stated that, in its current formulation, article 60 expressed an aspiration rather than a legal rule. It was also observed that the draft Model Law should not interfere with civil procedure law or introduce rules that would be inconsistent with recommendations of the Secured Transactions Guide. As a drafting matter, the suggestion was made that article 60 could be merged with article 59 to establish a general principle of court relief, including in the form of accelerated proceedings. After discussion, the Working Group agreed that article 60 should be deleted and the matter addressed therein should be discussed in the guide to enactment, with examples of expedited proceedings (see also para. 95 below).

**Article 61. Post-default rights of the grantor and the secured creditor and  
Article 62. Judicial and extrajudicial methods of exercising post-default rights**

20. The Working Group agreed that articles 61 and 62 should be retained with a cross-reference to article 4 on the general standard of conduct (see A/CN.9/WG.VI/WP.59).

**Article 63. Right to take over enforcement**

21. Subject to a revision of its heading to better fit its contents and to replacing the references to “control of enforcement” with the words “takes over enforcement” (as the term “control” was used to refer to a method for achieving third-party effectiveness), the Working Group agreed that article 63 should be retained.

**Article 64. Right of redemption**

22. Subject to clarifying the meaning of the words “until the earlier of” in paragraph 2, the Working Group agreed that article 64 should be retained.

**Article 65. Extinction of the security right after full satisfaction of the secured obligation**

23. The Working Group agreed that article 65 should be retained but moved to the appropriate place in the text (either to the end of chapter VI or to chapter II, possibly article 11).

**Article 66. Secured creditor’s right to possession of an encumbered asset**

24. The Working Group agreed that article 66 should be retained.

**Article 67. Extrajudicial obtaining of possession of an encumbered asset**

25. The Working Group agreed that article 67 should be retained with appropriate adjustments to clarify that all three conditions set out therein should be satisfied and the necessary explanations should be given in the guide to enactment consistent with the Secured Transactions Guide (e.g., that while, subpara. (a) required the grantor’s positive consent, subpara. (c) referred to the fact of the absence of objection on the part of the grantor to avoid references to technical concepts, such as breach of peace or public order). A note of caution was struck that, whatever drafting technique was adopted in article 67 to clarify that all conditions needed to be met should be equally adopted throughout the draft Model Law.

**Article 68. Extrajudicial disposition of an encumbered asset**

26. Subject to the deletion of the cross-reference in paragraph 2 to the general standard of conduct, which would be applicable throughout the draft Model Law anyway, the Working Group agreed that article 68 should be retained.

**Article 69. Advance notice of extrajudicial disposition of an encumbered asset**

27. A number of suggestions of a drafting nature were made with respect to article 69, including that: (a) the words “or the time and place of disposition” should be inserted in paragraph 3 after the words “disposed of”; (b) the words “in writing” in paragraph 3 should be deleted (as notice was defined in article 2, subpara. (r) as a communication in writing); (c) the words “being enforced” at the end of paragraph 5 should be deleted (as it was not the security agreement, but the security right that was being enforced); and (d) the different uses of the term “notice” should be reviewed with a view to determining whether different terms should be used, such as “registration notice” or “registered notice”. Subject to those suggestions, the Working Group agreed that article 69 should be retained.

**Article 70. Distribution of proceeds of disposition of an encumbered asset**

28. The Working Group agreed that article 70 should be retained.

**Article 71. Acquisition of an encumbered asset in satisfaction of the secured obligation**

29. A suggestion was made that article 71 could be elaborated to contemplate the possibility of the secured creditor applying to a court to acquire the encumbered asset if the objection by the grantor was unjustified or abusive. That suggestion was objected to. It was noted that, in line with the approach taken in the Secured Transactions Guide, the grantor should have the freedom to refuse the secured creditor’s offer, in which case, the secured creditor might choose to pursue one of its other remedies provided in the draft Model Law (see Secured Transactions Guide, chapter VIII, paras. 67-70). With respect to paragraph 3, the Working Group agreed that it should be aligned more closely with recommendation 157, subparagraph (b), of the Secured Transactions Guide while the additional information requirement currently set out in that paragraph should be retained. With respect to paragraph 5, the Working Group confirmed the understanding that it should be clarified to explain that, in the case of full satisfaction of the secured obligation, it would be sufficient if each

addressee did not object in a timely fashion. Subject to those changes, the Working Group agreed that article 71 should be retained.

#### **Article 72. Rights acquired through judicial disposition**

30. The Working Group agreed that the words “other officially administered process” in article 72 (and the words “or other authority” in art. 62, para. 1) should be placed within square brackets and the guide to enactment should give examples of such a process, including a process administered by a chamber of commerce or a notary public. It was also agreed that the guide to enactment should provide some guidance with respect to judicial disposition processes (e.g., sale and distribution of encumbered assets supervised by a court). Subject to those changes, the Working Group agreed that article 72 should be retained.

#### **Article 73. Rights acquired through extrajudicial disposition**

31. The Working Group agreed that the term “good faith” should be used in the draft Model Law only to express an objective standard of conduct (see A/CN.9/WG.VI/WP.59, art. 4, para. 1), while other terminology should be used to express a subjective standard (i.e., knowledge of a fact on the part of a person). As a result, it was agreed that the words “good faith acquirer, lessee or licensee” in paragraph 4 of article 73 should be replaced by wording that would neither require only knowledge of non-compliance with a rule on enforcement nor go as far as to require collusion between the secured creditor and the acquirer.

### **C. Chapter VII. Asset-specific rules (A/CN.9/WG.VI/WP.57/Add.3)**

#### **1. General**

32. Differing views were expressed as to the presentation of the asset-specific rules in chapter VII. One view was that all the asset-specific rules should be presented in a single chapter that would come after chapter VI. It was stated that such an approach would allow the reader to have an overview of all the asset-specific rules after having obtained an overview of all the generally applicable rules. Another view was that each part of the asset-specific rules should be presented in a separate chapter that should come before chapter VI. It was stated that such an approach would result in avoiding giving the impression that a State could adopt or leave out of its law all of the asset-specific rules as a whole. It was also observed that such an approach would at the same time, result in presenting all those rules as closely as possible to the chapters dealing with the main issues addressed in the asset-specific rules (i.e., creation, third-party effectiveness and priority). After discussion, the Working Group agreed to defer a decision on the presentation of the asset-specific rules in chapter VII (and the relevant definitions in art. 2 of the draft Model Law) until it had reviewed their substance (see para. 94 below).

#### **2. Receivables**

33. The Working Group agreed that the section of chapter VII on receivables should follow as closely as possible the relevant recommendations of the Secured Transactions Guide and the respective provisions of the United Nations Assignment Convention on which those recommendations were based. Noting that several States had already adopted the key principles in the United Nations Assignment Convention, one delegation stated that it was taking steps to ratify the Convention and expressed the hope that other States would also become parties to the Convention.

#### **Article 74. Anti-assignment clauses**

34. The suggestion was made that article 74 should be placed within square brackets so as to provide more flexibility to States. That suggestion was objected to. It was stated that article 74 reflected a key provision for receivables financing that was included in both the United Nations Assignment Convention (art. 9) and the Secured Transactions Guide (rec. 24). It was also observed that, without such a provision, lending against the security of receivables would become extremely difficult or costly as in a typical transaction lenders would need to check a large number of contracts, which would not be even possible in the

case of future receivables. With respect to the bracketed text in paragraph 2 of article 74, the Working Group agreed that it should be retained outside of square brackets. Subject to that change, the Working Group agreed that article 74 should be retained.

**Article 75. Creation of a security right in a personal or property right that secures a receivable**

35. It was agreed that the heading of article 75 (which was based on rec. 25 of the Secured Transactions Guide and art. 10 of the United Nations Assignment Convention) should be revised to better reflect its contents. In addition, it was agreed that the words “a secured creditor ... has the benefit of” in paragraph 1 and “the security right automatically extends to” in paragraph 2 should be retained but explained in the guide to enactment. Moreover, it was agreed that, to avoid repetition, paragraph 4 might be merged with paragraph 1. It was also agreed that the bracketed text in paragraph 5 should be retained outside of square brackets. It was also agreed that the terminology used in article 75 and throughout the section of chapter VII on receivables (e.g., assignor and assignee or grantor and secured creditor) should be reviewed and revised to ensure consistency. Subject to those changes, the Working Group agreed that article 75 should be retained.

**Article 76. Representations of the assignor**

36. The Working Group agreed that article 76 (which was based on rec. 114 of the Secured Transactions Guide and art. 12 of the United Nations Assignment Convention) should be retained.

**Article 77. Right to notify the debtor of the receivable**

37. In response to a question, it was noted that article 77 (which was based on rec. 115 of the Secured Transactions Guide and art. 13 of the United Nations Assignment Convention) dealt with the question of who could notify the debtor of the receivable, the definition of the term “notification of the assignment” in article 2, subparagraph (s), and article 80 dealt with the question of the content of a notification and various articles (e.g., art. 81) dealt with the legal consequences of a notification. It was agreed that the guide to enactment could usefully explain how article 77 and other articles in the section of chapter VII on receivables dealt with those matters. It was also agreed that the term “notification of the assignment” or “notification of an assignment” should be used consistently in article 77 and in all the relevant articles.

**Article 78. Right of the assignee to payment**

38. The Working Group agreed that article 78 (which was based on rec. 116 of the Secured Transactions Guide and art. 14 of the United Nations Assignment Convention) should be retained.

**Article 79. Protection of the debtor of the receivable**

39. The Working Group agreed that article 79 (which was based on rec. 117 of the Secured Transactions Guide and art. 15 of the United Nations Assignment Convention) should be retained.

**Article 80. Notification of the assignment**

40. Subject to any revision necessary to ensure consistency in the terminology used and any explanation of the relationship between a notification and a payment instruction in the guide to enactment, the Working Group agreed that article 80 (which was based on rec. 118 of the Secured Transactions Guide and art. 16 of the United Nations Assignment Convention) should be retained.

**Article 81. Discharge of the debtor of the receivable by payment**

41. Subject to any revision necessary to ensure consistency in the terminology used, the Working Group agreed that article 81 (which was based on rec. 119 of the Secured Transactions Guide and art. 17 of the United Nations Assignment Convention) should be retained.

**Article 82. Defences and rights of set-off of the debtor of the receivable,  
Article 83. Agreement not to raise defences or rights of set off,  
Article 84. Modification of the original contract and  
Article 85. Recovery of payments made by the debtor of the receivable**

42. The Working Group agreed that articles 82-85 (which were based on recs. 120-123 of the Secured Transactions Guide and arts. 18-21 of the United Nations Assignment Convention) should be retained.

**Article 86. Third-party effectiveness of a security right in a right that secures payment of a receivable**

43. With respect to article 86 (which was based on rec. 48 of the Secured Transactions Guide), the Working Group agreed that, while its substance should be retained, its terminology (“a security right extends”) and its placement in the section of chapter VII on receivables should be reviewed.

**Article 87. Application of the chapter on enforcement to an outright transfer of a receivable, Article 88. Enforcement and Article 89. Distribution of proceeds**

44. A number of suggestions were made with respect to articles 87-89 (which were based on recs. 167-169 and 172 of the Secured Transactions Guide). One suggestion was that articles 87-89 should be moved to the enforcement chapter. Another suggestion was that the relationship between articles 87 and 89, subparagraph (b), should be reviewed as, in the case of an outright assignment, the assignee could retain any surplus. Yet another suggestion was that the heading of article 89 should be revised to better reflect its contents. Yet another suggestion was that the terminology used in those articles should be reviewed for consistency. Yet another suggestion was that the guide to enactment should clarify that payment of any surplus should be made in the order of priority in accordance article 70 of the draft Model Law. While it postponed a decision as to the placement of those articles until it had completed its consideration of the asset-specific provisions, the Working Group agreed that all the other suggestions should be implemented (see para. 94 below).

**Article 90. Law applicable to the relationship between the debtor of the receivable and the assignee**

45. The Working Group agreed that article 90 (which was based on rec. 217 of the Secured Transactions Guide) should be retained. It was also agreed that in the guide to enactment reference should be made to the draft Hague Principles on Choice of Law in International Contracts.

### **3. Negotiable instruments**

**Article 91. Rights and obligations of the obligor**

46. The Working Group agreed that article 91 (which was based on rec. 124 of the Secured Transactions Guide) should be retained. It was also agreed that the guide to enactment should clarify that article 91 was intended to preserve the rights of an obligor under the law relating to negotiable instruments.

**Article 92. Priority**

47. The Working Group agreed that, while article 92 (which was based on recs. 101 and 102 of the Secured Transactions Guide) should be retained, paragraph 1 should be aligned more closely with recommendation 101 of the Secured Transactions Guide and the article as a whole should be reviewed for clarity in its treatment of priority among claimants with competing rights in a negotiable instrument. In the discussion, the concern was expressed that, to the extent that article 92 referred only to possession (defined as actual possession in art. 2, subpara. (u)) without any necessary endorsement, it might interfere with the law relating to negotiable instruments. In response, it was noted that article 92 dealt only with priority conflicts, while article 91 was sufficient to preserve the rights of an obligor under the law relating to negotiable instruments. After discussion, the Working Group agreed that article 92 should be retained.

**Article 93. Law applicable to third-party effectiveness in certain cases**

48. The Working Group agreed that article 93 (which was based on rec. 211 of the Secured Transactions Guide) should be retained. The question was raised whether the statement that articles 75, 86, 89 and 90 of the section on receivables also applied to negotiable instruments should be reflected in an article rather than in a footnote. Noting that the same approach was followed with respect to other articles in chapter VII, the Working Group deferred a decision until it had an opportunity to review the substance of all the articles in chapter II (see para. 94 below).

**4. Rights to payment of funds credited to a bank account****Article 94. Creation**

49. The Working Group agreed that article 94 should be aligned more closely with recommendation 26 of the Secured Transactions Guide and retained.

**Article 95. Rights and obligations of the depositary bank**

50. The Working Group noted that article 95 was based on recommendations 26, 125 and 126 of the Secured Transactions Guide. A number of suggestions were made. One suggestion was that the guide to enactment should clarify that the reference to “other law” in paragraph 2 did not inadvertently result in excluding contractual rights of set off of a depositary bank. Another suggestion was that the chapeau of paragraph 3 should be revised to state: “Nothing in this law obligates the depositary bank”. It was stated that under other law the depositary bank might be obligated to pay a person other than the account holder or to respond to queries for information with respect to an account. Yet another suggestion was that subparagraph 3 (a), which referred to control, should be deleted. It was stated that the draft Model Law did not obligate the depositary bank to pay anyone, unless there was a control agreement (see subpara. 3 (c)) and a court order. It was also observed that, in the case of a control agreement, the depositary bank would have agreed as a matter of contract law to pay the secured creditor and, in the case of a court order, the depositary bank would have to comply with the court order. Thus, it was pointed out that it was sufficient to provide in subparagraph 3 (c) that the draft Model Law did not obligate a depositary bank to enter into a control agreement or pay any person other than a secured creditor with a control agreement. It was also observed that, with the exception of a secured creditor that had entered into a control agreement, control involved either automatic control upon creation of a security right if the secured creditor was the depositary bank or upon a transfer of the account to the secured creditor. Yet another suggestion was that a definition of “control agreement” should be included in the draft Model Law (see A/CN.9/WG.VI/WP.59, art. 2). Subject to those changes, the Working Group agreed that article 95 should be retained.

**Article 96. Third-party effectiveness**

51. Subject to the inclusion of wording to clarify the circumstances that constituted control, the Working Group agreed that article 96 (which was based on rec. 49 of the Secured Transactions Guide) should be retained.

**Article 97. Priority**

52. The Working Group noted that article 97 was based on recommendations 103-105 of the Secured Transactions Guide. A number of suggestions were made with respect to article 97. One suggestion was that paragraphs 1 and 3 should be aligned more closely with recommendation 103. Another suggestion was that paragraph 5 should clarify that instances in which transfers were “initiated or authorized” by the grantor, persons acting on behalf of the grantor (e.g. the grantor’s insolvency representative) or successors of the grantor were also covered. Subject to those changes, the Working Group agreed that article 97 should be retained.

**Article 98. Enforcement**

53. The Working Group noted that article 98 was based on recommendations 173-175 of the Secured Transactions Guide. It was stated that the reference to the articles dealing with



the rights and obligations of the depositary bank in article 98 was superfluous and thus could be deleted. It was widely felt that articles 94 and 95 would in any case apply to any aspect of a security right in a right to payment of funds credited to a bank account, including its enforcement. Subject to that change, the Working Group agreed that article 98 should be retained.

#### **Article 99. Law applicable**

54. The Working Group noted that article 99 was based on recommendation 210 of the Secured Transactions Guide. Subject to the deletion of the superfluous reference to article 94 in paragraph 1 and to the inclusion of the rule contained in article 5 of the Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (the “Hague Securities Convention”) in paragraph 3, the Working Group agreed that article 99 should be retained.

### **5. Money**

#### **Article 100. Priority of a security right in money**

55. Noting that article 100 was based on recommendation 106 of the Secured Transactions Guide, the Working Group agreed that article 100 should be retained. A suggestion was made that the wording of paragraph 2 (“this article does not adversely affect”) might be used also in the context of article 91 (see para. 46 above).

### **6. Negotiable documents and tangible assets covered by a negotiable document**

#### **Article 101. Extension of a security right in a negotiable document to the tangible asset covered by the negotiable document, Article 102. Rights and obligations of the issuer of a negotiable document and Article 103. Third-party effectiveness**

56. The Working Group agreed that articles 101-103 (which were based on recs. 28, 130 and 51-53 of the Secured Transactions Guide) should be retained.

#### **Article 104. Priority**

57. Subject to the alignment of paragraphs 2 and 3 of article 104 with recommendation 109 of the Secured Transactions Guide, on which they were based, the Working Group agreed that article 104 should be retained.

#### **Article 105. Enforcement**

58. The Working Group agreed that article 105, which was based on recommendation 177 of the Secured Transactions Guide, should be retained.

### **7. Intellectual property**

#### **Article 106. Security rights in tangible assets with respect to which intellectual property is used**

59. The Working Group noted that article 106 was based on recommendation 243 of the Intellectual Property Supplement. The concern was expressed that, in its current formulation, article 106 did not reflect a legal rule suitable for a model law. It was thus suggested that article 106 should be either moved to the guide to enactment or revised. The concern was also expressed that the expression “a tangible asset with respect to which intellectual property is used” was not sufficiently clear and should be explained. Subject to those changes, the Working Group agreed that article 106 should be retained.

#### **Article 107. Impact of a transfer of encumbered intellectual property on the effectiveness of the registration**

60. The Working Group noted that article 107 was based on recommendation 244 of the Intellectual Property Supplement. A number of suggestions were made. One suggestion was that it should be clarified that, according to article 54 of the draft Model Law, a security right made effective against third parties by registration of a notice in an intellectual property registry had priority over a security right made effective against third parties by registration

of a notice in the general security rights registry. It was also suggested that the guide to enactment should clarify that, in any case, as a result of article 1, subparagraph 3 (c) (see A/CN.9/WG.VI/WP.59), the draft Model Law would not apply to security rights in intellectual property in so far as the draft Model Law was inconsistent with law relating to intellectual property. Subject to those changes or clarifications, the Working Group agreed that article 107 should be retained.

#### **Article 108. Priority of rights of certain licensees of intellectual property**

61. The Working Group noted that article 108 was based on recommendation 245 of the Intellectual Property Supplement. The suggestion was made that the guide to enactment should clarify the meaning of the “ordinary course of business” concept, which was unknown in an intellectual property context, by making appropriate references to the Intellectual Property Supplement. Subject to that clarification, the Working Group agreed that article 108 should be retained.

#### **Article 109. Right of the secured creditor to preserve the encumbered intellectual property**

62. The Working Group was noted that article 109 was based on recommendation 246 of the Intellectual Property Supplement. As a matter of drafting, it was suggested that the word “may” should be replaced by words along the following lines: “have the power to”. The Working Group agreed that article 109 should be retained.

#### **Article 110. Application of acquisition security right provisions to security rights in intellectual property**

63. The Working Group noted that article 110 was based on recommendation 247 of the Intellectual Property Supplement. It was suggested that the guide to enactment should clarify the reference to the notion of “ordinary course of business sale” in subparagraph 2(a)(i) of article 110, which was unknown in an intellectual property context, by making appropriate references to the Intellectual Property Supplement. Subject to that clarification, the Working Group agreed that article 110 should be retained.

#### **Article 111. Law applicable to a security right in intellectual property**

64. Noting that article 111 was based on recommendation 248 of the Intellectual Property Supplement, the Working Group agreed that it should be retained.

65. At the conclusion of its discussion of articles 106-111 on intellectual property, the Working Group agreed that those articles dealt with an extremely important type of asset in a balanced way that was consistent with the Intellectual Property Supplement and should thus be retained in the draft Model Law outside square brackets.

### **D. Chapter VIII. Transition (A/CN.9/WG.VI/WP.57/Add.3)**

66. The Working Group agreed that the transition rules of the draft Model Law should include rules that would sufficiently address a situation in which a State moved from one registration system to another and a situation in which a State moved from no registration system to a registration system. As to whether rules should be included to address situations that involved a change in the applicable law, the Working Group agreed to defer a decision until it had an opportunity to consider the conflict-of-laws provisions of the draft Model Law.

#### **Article 112. General**

67. The Working Group noted that article 112 was based on recommendation 228 of the Secured Transactions Guide. A number of suggestions were made, including that: (a) a general provision should be inserted to deal with the relationship between the new law and other laws to be specified by the enacting State that would be abrogated by the new law; (b) the definition of the term “effective date” in subparagraph 2 (b) should be deleted and replaced with the words “date on which this Law enters into force”; (c) “prior security right” should be defined as a right created by agreement or other transaction concluded before the

effective date of the law without any reference to a “security” agreement, since an agreement might not be considered a security agreement under prior law; and (d) paragraph 4 could be deleted as it stated the obvious. Subject to those changes, the Working Group agreed that article 112 should be retained.

#### **Article 113. Actions commenced before the effective date**

68. The Working Group noted that article 113 was based on recommendation 229 of the Secured Transactions Guide. Subject to any revision necessary to clarify in subparagraph (b) what constituted commencement of enforcement which involved several stages (i.e. notice of default, repossession, sale and allocation of proceeds), the Working Group agreed that article 113 should be retained.

#### **Article 114. Creation of a security right**

69. The suggestion was made that article 114 should be aligned more closely with recommendation 230 of the Secured Transactions Guide, on which it was based, so as to clarify in particular that the prior law would determine whether a security right was created before the date the new law entered into force. The suggestion was also made that reference should be made to a security right being “effective as between the parties” to avoid a misunderstanding that what was meant was that the security right was “effective” or “opposable” against third parties. Subject to those changes, the Working Group agreed that article 114 should be retained.

#### **Article 115. Third-party effectiveness of a security right**

70. The Working Group noted that article 115 was based on recommendation 231 of the Secured Transactions Guide. The suggestion was made that article 115 should clarify that a security agreement was sufficient as authorization for registration under the new law (see A/CN.9/WG.VI/WP.59/Add.1, art. 24, para. 3) even if that was not the case under the prior law. The suggestion was also made that paragraph 2 should be revised to provide that “a security right continued to be effective” and paragraph 3 should be deleted as superfluous. Subject to those changes, the Working Group agreed that article 115 should be retained.

#### **Article 116. Priority of a security right**

71. The Working Group noted that article 116 was based on recommendations 232-234 of the Secured Transactions Guide. Subject to the clarification that paragraph 3 of article 116 set out an exclusive list of instances that constituted a change in the priority status of a security right, the Working Group agreed that article 116 should be retained.

### **E. Non-intermediated securities**

72. The Working Group noted that the Commission, at its forty-sixth session, in 2013, had agreed that whether the draft Model Law should address security interests in non-intermediated securities would be assessed at a future time (see A/68/17, para. 332). Accordingly, the Working Group engaged in a discussion about non-intermediated securities, noting that security interests in non-intermediated securities were not addressed in the Unidroit Convention on Substantive Rules for Intermediated Securities (the “Unidroit Securities Convention”), the Hague Securities Convention or Secured Transactions Guide.

73. Noting that non-intermediated securities (e.g. shares and bonds) were regularly used in commercial finance transactions as security, in particular by small- and medium-size enterprises, the Working Group engaged in a discussion of asset-specific rules that could apply to security rights in non-intermediated securities. The Working Group first considered the following definitions:

(a) “Securities” means any shares, bonds or other financial instruments or financial assets [(other than cash)] [other than money, receivables or [any other type of asset to be excluded by the enacting State]];

(b) “Intermediated securities” means securities credited to a securities account or rights or interests in securities resulting from the credit of securities to a securities account;

(c) “Non-intermediated securities” means securities other than intermediated securities;

(d) “Certificated non-intermediated securities” means non-intermediated securities represented by a [paper] certificate that:

(i) Expressly states that the person entitled to the securities is the person in physical possession of the certificate (“bearer securities”) [or otherwise states that the securities are bearer securities]; or

(ii) Expressly identifies the person entitled to the securities [and is transferable by registration of the securities in the name of the transferee in the books maintained for that purpose by or on behalf of the issuer (“securities in registrable form”)];

(e) “Dematerialized non-intermediated securities” means non-intermediated securities not represented by a paper certificate that are transferable by registration of the securities in the name of the transferee in the books maintained for that purpose by or on behalf of the issuer;

(f) “Control” with respect to dematerialized non-intermediated securities exists if a control agreement has been concluded among the issuer, the grantor and the secured creditor; and

(g) “Control agreement” means an agreement among the issuer of non-intermediated securities, the grantor and the secured creditor, evidenced by a signed writing, according to which the issuer has agreed to follow instructions from the secured creditor with respect to the securities to which the agreement relates without further consent from the grantor [and is not permitted to follow the instructions of the grantor with respect to those securities without the consent of the secured creditor].

74. With respect to the definition of the term “securities”, it was widely felt that it was overly broad and could thus result in subjecting receivables and negotiable instruments to the rules applicable to securities. After discussion, the Working Group agreed that the definition of the term “securities” should provide general guidance by referring to debt and equity instruments (i.e. shares of companies, including partnerships and limited liability companies, and both private and public bonds), while leaving it to each enacting State to set out to complete the definition according to its law.

75. With respect to the definitions of the terms “intermediated securities”, “non-intermediated securities” and “dematerialized non-intermediated securities”, it was agreed that they should be retained in their present formulation for further consideration.

76. With respect to the definition of “certificated non-intermediated securities”, it was agreed that the word “paper” should be retained outside square brackets, subparagraph (d)(i) should follow a functional approach and thus be revised to refer to the terms of the certificate, and the bracketed text in subparagraph (d)(ii) should be retained outside square brackets.

77. With respect to the definition of the term “control”, it was agreed that, for reasons of clarity and efficiency, it should be deleted and the relevant articles should refer directly to the term “control agreement”.

78. With respect to the definition of the term “control agreement”, it was agreed that the bracketed text referring to negative control on the part of the secured creditor was unnecessary as it was covered by the reference to positive control by way of a control agreement and should thus be deleted.

79. Subject to the above-mentioned changes (see paras. 74-78 above), the Working Group agreed that the above-mentioned definitions should be retained and explained in the guide to enactment.

80. The Working Group next turned to the question whether outright transfers of non-intermediated securities should be covered in the draft Model Law. After discussion, it was agreed that outright transfers of non-intermediated securities should not be covered as, unlike outright transfers of receivables, outright transfers of non-intermediated securities were not part of significant financing practices, and, in any case, would be subject to securities law.

81. However, it was agreed that a priority conflict between a security right in, and the right of a transferee of, non-intermediated securities should be addressed. As to how that matter should be addressed, a number of suggestions were made. One suggestion was that the general priority rule contained in article 47 (see A/CN.9/WG.VI/WP.57/Add.2) should apply. It was noted that application of article 47 would result in a transferee of non-intermediated securities taking the securities subject to a security right that was effective against third parties. Another suggestion was that a rule along the lines of article 100 (see A/CN.9/WG.VI/WP.57/Add.3) should be added to provide that: (a) a transferee of non-intermediated securities would take them free of a security right, unless the transferee had knowledge that the transfer violated the rights of the secured creditor under the security agreement; and (b) that provision did not adversely affect the rights of holder of securities under other law. Yet another suggestion was that a rule along the lines of article 104 (see A/CN.9/WG.VI/WP.57/Add.3) could accommodate both the recognition of the general priority rule and the need for an exception to that general rule where the rights of transferee were protected under other law.

82. In response to a question, the Working Group confirmed that the partial override of anti-assignment clauses provided in article 74 (see A/CN.9/WG.VI/WP.57/Add.3) applied only to receivables (and not to non-intermediated securities or any other types of asset). In that connection, the Working Group also agreed that the draft Model Law should not override statutory limitations to the creation or enforcement of a security right, or to the transferability of specific types of asset, and thus should include a provision along the lines of recommendation 18 of the Secured Transactions Guide.

83. The Working Group next turned to discuss a number of articles on non-intermediated securities.

84. With respect to third-party effectiveness of a security right in non-intermediated securities, the Working Group considered the following article:

**“Article 112. Third-party effectiveness**

“1. A security right in certificated non-intermediated securities is made effective against third parties by delivery of the certificate to the secured creditor [and, if the certificate is not in bearer form, endorsement of the certificate in favour of the secured creditor,] or by registration of a notice with respect to the security right in the general security rights registry.

“2. A security right in dematerialized non-intermediated securities is made effective against third parties by registration of a notice with respect to the security right in the general security rights registry, by registration of the securities in the name of the secured creditor in the issuer’s books, or by control.”

85. The Working Group agreed that the bracketed text in paragraph 1 should be deleted. It was widely felt that, while endorsement might be a condition for the transfer of non-intermediated securities under other law, it did not need to be made a condition for achieving third-party effectiveness. The suggestion was made that registration in the books of the issuer should also be included in paragraph 1 as an additional method for achieving third-party effectiveness. There was no support for that suggestion. It was widely felt that, in the case of a typical transaction, a secured creditor would either obtain possession of the certificate or register a notice in the general security rights registry. While the view was expressed that, with the above-mentioned changes, paragraph 1 reiterated the general third-party effectiveness rule of article 13 (see A/CN.9/WG.VI/WP.59) and might not be necessary, the Working Group agreed that it should be retained for further consideration.

86. With respect to paragraph 2, it was agreed that reference should be made to a “control agreement” rather than to control (see para. 5 above) and to the “books maintained for that purpose by or on behalf of the issuer” rather than to “the books of the issuer” (see definition (d)(ii) in para. 73 above). It was also agreed that the text of paragraph 2 should be revised to ensure that it was sufficient to make a notation about the security right in the issuer’s books and that it was not necessary to register the securities in the name of the secured creditor as if the secured creditor were a transferee.

87. Subject to the above-mentioned changes (see paras. 85 and 86 above), the Working Group agreed that article 112 should be retained.

88. With respect to priority, the Working Group considered the following article:

**“Article 113. Priority**

“1. A security right in certificated non-intermediated securities made effective against third parties by delivery of the certificate to the secured creditor [with any necessary endorsement] has priority over a security right in the same securities made effective against third parties by registration of a notice with respect to the security right in the general security rights registry.

“2. A security right in dematerialized non-intermediated securities made effective against third parties by control has priority over a security right in the same securities made effective against third parties by registration of a notice with respect to the security right in the general security rights registry.

“3. A security right in dematerialized non-intermediated securities made effective against third parties by registration of the securities in the name of the secured creditor in the issuer’s books has priority over a security right in the same securities made effective against third parties by control or by registration of a notice with respect to the security right in the general security rights registry.”

89. It was agreed that in paragraph 1 the reference to endorsement should be deleted (see para. 85 above), in paragraphs 2 and 3 reference should be made to the control agreement (see paras. 77 and 86 above) and in paragraph 3 reference should be made to a notation in the books maintained for that purpose by or on behalf of the issuer (see para. 86 above).

90. With respect to the law applicable, the Working Group considered the following article:

**“Article 114. Law Applicable**

“1. The law applicable to the effectiveness of a security right in certificated non-intermediated securities as against the issuer is the law of the State under which the issuer is constituted[, unless the issuer has chosen the law of another State, in which case the law of the State chosen by the issuer is the applicable law].

“2. The law applicable to the creation, third-party effectiveness and priority of a security right in certificated non-intermediated securities is the law of the State in which the certificate is located.

“3. The law applicable to the enforcement of a security right in certificated non-intermediated securities is the law of the State in which enforcement takes place.

“4. The law applicable to the effectiveness against the issuer, the creation, the effectiveness against third parties, the priority and the enforcement of a security right in dematerialized non-intermediated securities is the law of the State under which the issuer is constituted.”

91. It was agreed that the bracketed text in paragraph 1 should be deleted. It was widely felt that referring to the law chosen by the issuer would create uncertainty as it would be extremely difficult for prospective secured creditors to know whether the issuer had chosen another law and, if so, which one. In addition, it was agreed that the formulation of paragraph 1 might need to be revised to address issuers that were public entities. In addition, it was agreed that, with respect to the relevant time for determining the location of the certificate or the issuer, reference should be made in the guide to enactment to article 7 of Annex II (see A/CN.9/WG.VI/WP.57/Add.4). Moreover, it was agreed that the guide to enactment should discuss coordination of the draft model provisions with securities law. Subject to those changes, the Working Group agreed that article 114 should be retained.

92. In the discussion, one delegation stated that it could not take a position on whether the draft Model Law should address security rights in non-intermediated securities before considering the relationship between the draft Model Law and the European Union Collateral Directive (2002/47/EC), as amended by Directive 2009/44/EC. In response, another delegation observed that security rights in non-intermediated securities should be addressed in the draft Model Law, in particular in view of their importance as security for credit to small- and medium-size enterprises. It was also pointed out that, in any case, a regional approach should not dictate the approach to be followed at the international level.

93. After discussion, the Working Group decided to make a recommendation to the Commission that the draft Model Law should address security rights in non-intermediated securities along the lines mentioned above. Subject to the Commission's decision, the Working Group noted that articles 112-114 as revised should be included in the draft Model Law.

94. Having concluded its deliberations on all asset-specific rules, the Working Group agreed that they should be placed in an asset-specific section in each of the relevant chapters of the draft Model Law. It was widely felt that such an approach would result in preserving the flexibility of each State to adopt those asset-specific articles it needed, while presenting those articles in the appropriate substantive context. The Working Group also agreed that efforts should be made so that the articles on receivables would use generic secured transaction terminology (e.g. grantor, secured creditor, creation of a security right) instead of terms specific to receivables (e.g. assignor, assignee, assignment of a receivable).

95. In the discussion, the Working Group considered a suggestion to reinsert in the draft Model Law a revised version of article 60, which it had decided to delete (see para. 19 above). The following text was proposed: "Where the secured creditor, the grantor or any other person that owes performance of the secured obligation, or claims to have a right in an encumbered asset, applies to a court or other judicial authority with respect to the exercise of post-default rights, the proceedings should be conducted by way of summary judicial proceedings or alternative official or officially recognized dispute resolution mechanisms to be established or determined by the enacting State". While it was widely felt that that expeditious judicial proceedings were extremely important for a modern secured transactions law, differing views were expressed as to where such a provision should be placed, particularly in view of the fact the civil procedure law differed from State to State and did not lend itself to unification. One view was that such a provision should be retained in the draft Model Law (within square brackets) to emphasize the importance of summary, official or officially administered (e.g. by a notary public or a chamber of commerce) dispute resolution mechanisms. Another view was that, while such a provision that expressed a recommendation and did not provide for a specific proceeding had no place in a model law, it could usefully be included in the guide to enactment. After discussion, the Working Group did not reach a decision with respect to the suggestion to reinsert in the draft Model Law a revised version of article 60 (see para. 19 above).

## **F. Annex I. Acquisition financing (A/CN.9/WG.VI/WP.57/Add.4)**

96. Noting that rules on acquisition financing were an integral and necessary part of a modern secured transactions law, the Working Group agreed that the articles on acquisition financing should be part of the draft Model Law rather than of an annex. For reasons of clarity, simplicity and efficiency, the Working Group also agreed that it was sufficient to implement the unitary approach to acquisition financing. It was stated that States that wanted to implement the non-unitary approach would find sufficient guidance in the Secured Transactions Guide. After discussion, the Working Group agreed to incorporate into the draft Model Law only the articles relating to the unitary approach to acquisition financing. It was further agreed that, to follow a more reader-friendly approach, those articles should be placed in the relevant chapters on third-party effectiveness and priority.

97. The Working Group next considered the definitions of the terms "acquisition secured creditor" and "acquisition security right" (see A/CN.9/WG.VI/WP.57/Add.4) and agreed that, with the exception of the clarification that the term security right included an acquisition security right that was superfluous, they should be included in article 2 of the draft Model Law (see A/CN.9/WG.VI/WP.59).

### **Article 1. Third-party effectiveness of an acquisition security right in consumer goods and Article 2. Priority of an acquisition security right**

98. With respect to articles 1 and 2, a number of suggestions were made, including that: (a) the guide to enactment should clarify the relationship between article 1 (based on rec. 179 of the Secured Transactions Guide) and article 54 (priority of a security right registered in a specialized registry); and (b) article 2 should be revised to ensure consistent

use of terminology, and in subparagraph (c) of alternative A refer to the receipt rule. Subject to those changes, the Working Group agreed that articles 1 and 2 should be retained.

### **Article 3. Priority among acquisition security rights**

99. Recalling its decision to include only the unitary approach in the draft Model Law (see para. 96 above), the Working Group agreed that article 3, paragraph 2, and other articles of the draft Model Law should not make any reference to the terminology used in the non-unitary approach. In that context, it was agreed that the definitions of the terms “acquisition secured creditor” and “acquisition security right” should be revised accordingly. It was also agreed that article 3, paragraph 2 (based on recommendation 182 of the Secured Transactions Guide), should refer to “seller” and “lessor”.

### **Article 4. Priority of an acquisition security right as against the right of a judgement creditor**

100. With respect to article 4, it was agreed that it should be aligned more closely with recommendation 183 of the Secured Transactions Guide.

### **Article 5. Priority of an acquisition security right in proceeds of a tangible asset**

101. With respect to article 5, it was agreed that it should be aligned more closely with recommendation 185 of the Secured Transactions Guide.

102. At the end of the discussion on acquisition financing, one delegation expressed the concern that the Working Group’s decision not to include the non-unitary approach articles in the draft Model Law might go beyond the mandate given to the Working Group by the Commission to prepare a simple, short and concise model law based on the recommendations of the Secured Transactions Guide and consistent with all texts of UNCITRAL (see paras. 1 and 3 above).

## **G. Annex II. Conflict of laws (A/CN.9/WG.VI/WP.57/Add.4)**

103. The Working Group agreed that the articles on conflict of laws were an integral part of a modern secured transactions law and should thus be incorporated in the draft Model Law as a separate chapter. It was also agreed that, in view of the different legislative approaches taken by States, an explanation should be included at the beginning of the chapter that it was up to each State to implement it as part of its secured transactions law or as part of another law.

104. With respect to article 2, paragraph 4, it was agreed that it should be aligned more closely with recommendation 206 of the Secured Transactions Guide.

105. With respect to article 4, subparagraph (a), it was agreed that the guide to enactment should clarify the meaning of the term “enforcement”, as that term included several acts that might take place in different States.

106. With respect to articles 8 and 9, it was agreed that they should be aligned more closely with the formulation used in UNCITRAL and other international texts, such as the draft Hague Principles on the Choice of Law in International Contracts.

107. With respect to article 10, paragraph 2, it was agreed that it should be aligned more closely with the formulation of recommendation 31 of the UNCITRAL Legislative Guide on Insolvency Law.

108. With respect to article 11, which was based on recommendation 207 of the Secured Transactions Guide, it was agreed that it should be recast to clarify that its purpose was to relieve the secured creditor from having to register within a short period of time both in the State of origin and in the State of destination.



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**H. Chapter I. Scope of application and general provisions  
(A/CN.9/WG.VI/WP.59)**

109. Recalling its decisions to include the articles on intellectual property and non-intermediated securities in the draft Model Law (see paras. 65 and 93 above), the Working Group agreed that the square brackets in article 1, subparagraph 3 (c), and, subject to the decision of the Commission, in article 1, subparagraph 3 (d), should be removed.

110. With respect to article 1, subparagraph 3 (g), it was agreed that it should be revised to clarify that proceeds of an excluded type of asset were excluded as proceeds but not as original encumbered assets, if they fell within the scope of the draft Model Law.

**D. Note by the Secretariat on a Draft Model Law  
on Secured Transactions**

(A/CN.9/WG.VI/WP.59 and Add.1)

[Original: English]

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## Chapter I. Scope of application and general provisions

### Article 1. Scope of application

1. This Law applies to all rights in movable assets created by agreement that secure the payment or other performance of an obligation, regardless of the form of the transaction or the terminology used by the parties, the type of asset, the status of the grantor or secured creditor, or the nature of the secured obligation.
2. Subject to article 87, the Law applies to outright transfers of receivables.
- [3. Notwithstanding paragraphs 1 and 2 of this article, this Law does not apply to:
  - (a) Rights to draw under an independent undertaking;

(b) Aircraft, railway rolling stock, space objects, ships as well as other categories of mobile equipment in so far as such asset is covered by other law and the matters covered by this Law are addressed in that other law;

[(c) Intellectual property in so far as this Law is inconsistent with law relating to intellectual property;]<sup>1</sup>

(d) [Intermediated] securities;

(e) Payment rights arising under or from financial contracts governed by netting agreements, except a receivable owed on the termination of all outstanding transactions;

(f) Payment rights arising under or from foreign exchange transactions;

(g) Proceeds of an excluded type of asset even if the proceeds are of a type of asset to which this Law applies, but only to the extent that other law applies; and

(h) [...].]<sup>2</sup>

4. This Law does not apply to a security right created in favour of an individual for his or her personal, family or household purposes.

5. Nothing in this Law affects the rights and obligations of a grantor or a debtor of an encumbered receivable under special laws relating to the protection of parties to transactions made for personal family or household purposes.

[6. Paragraphs 4 and 5 of this Law apply to [small enterprises] [micro-businesses].]

7. Except as provided in articles 74 and 75, nothing in this Law overrides contractual or legal limitations on the creation or enforcement of a security right in, or the transferability of, specific types of asset.

*[Note to the Working Group: The Working Group may wish to consider paragraph 3 of this article once it has completed the first reading of the draft Model Law. With respect to consumer transactions, the Working Group may wish to note that: (a) paragraph 4, which is based on article 4, subparagraph 1 (a) of the United Nations Convention on the Assignment of Receivables in International Trade (the “Assignment Convention”), is intended to exclude secured transactions in which the secured creditor is a consumer; (b) paragraph 5, which is based on article 4, paragraph 4 of the Assignment Convention, is intended to implement the policy of recommendation 2, subparagraph (b) of the UNCITRAL Legislative Guide on Secured Transactions (the “Secured Transactions Guide”), resulting in the application of the draft Model Law to secured transactions in which the grantor or the debtor of an encumbered receivable is a consumer, subject to consumer protection legislation; and (c) both paragraphs 4 and 5 follow the formulation of the Assignment Convention (which followed the formulation of the United Nations Convention on Contracts for the International Sale of Goods (the “CISG”), article 2, subpara. (a)) and refer to the purpose of a transaction rather than to the term “consumer”, as the exact meaning of that term would vary from State to State. The Working Group may also wish to note that paragraph 6 is intended to implement a suggestion made at the 24th session of the Working Group that the protection afforded by the draft Model Law to consumers might be extended to micro-businesses (A/CN.9/796, para. 47). If the Working Group decides to retain paragraph 6, it may wish to consider whether a more neutral term could be used that would fit all States. Alternatively, the Working Group may wish to consider whether the guide to enactment of the draft Model Law (the “Guide to Enactment”) should explain that the exact meaning of the term “small enterprise”, “micro-business” or any other similar term that might be used should be left to each enacting State as what is a small or micro-business would vary from State to State.]*

<sup>1</sup> The enacting State will have to adjust this provision to fit its intellectual property law.

<sup>2</sup> If the enacting State decides to introduce any other exception(s), they should be limited and set out in a clear and specific way.

## [Article 2. Definitions

For the purposes of this Law:

*[Note to the Working Group: The Working Group may wish to note that the definitions of the terms “acquisition secured creditor” and “acquisition security right”, “financial lease right” and “retention-of-title right” that were included in the terminology of the UNCITRAL Legislative Guide on Secured Transactions (the “Secured Transactions Guide”) have been moved to Annex I on acquisition financing. The Working Group may also wish to note that the references to the unitary and non-unitary approach to secured transactions in the relevant definitions have been deleted as they do not fit in a model law and have been included in Annex I on acquisition financing. The Working Group may also wish to note that, if the Working Group decides that security rights in intellectual property should be covered in the draft Model Law, it may wish to consider whether the definitions included in the Supplement on Security Rights in Intellectual Property (the “Intellectual Property Supplement”) should be added to article 2.]*

(a) “Assignee” means a person to which an assignment of a receivable is made;

(b) “Assignment” means the creation of a security right in a receivable that secures the payment or other performance of an obligation. For convenience of reference, the term also includes an outright transfer of a receivable;

(c) “Assignor” means a person that makes an assignment of a receivable;

(d) “Bank account” means an account maintained by a bank, to which funds may be credited. The term includes a checking or other current account, as well as a savings or time deposit account. The term does not include a right against the bank to payment evidenced by a negotiable instrument;

*[Note to the Working Group: The Working Group may wish to note that the definitions of the terms “attachment to a movable asset” and “attachment to immovable property”, as well as the relevant recommendations have been deleted in the interest of addressing in the draft Model Law key issues and referring for the rest to the recommendations of the Secured Transactions Guide. The Working Group may also wish to note that the definitions of terms such as “insolvency court”, “insolvency estate” and “insolvency proceedings”, and the insolvency chapter of the Secured Transactions Guide, have been deleted, as insolvency matters, including definitions, would normally be addressed in insolvency law.]*

(e) “Competing claimant” means a creditor of a grantor that is competing with respect to an encumbered asset with another creditor of the grantor having a security right in the encumbered asset of the grantor and includes:

(i) Another creditor with a security right in the same encumbered asset (whether as an original encumbered asset or proceeds);

(ii) The [enacting State to determine whether reference should be made to an acquisition secured creditor only or also to a seller or financial lessor] of the same encumbered asset that has retained title to it;

(iii) Another creditor of the grantor that has a right in the same encumbered asset;

(iv) The insolvency representative [and creditors] in the insolvency proceedings in respect of the grantor; or

(v) Any buyer or other transferee (including a lessee or licensee) of the encumbered asset;

*[Note to the Working Group: The Working Group may wish to consider whether the bracketed text in subparagraph (iv) should be retained, as in some jurisdictions the estate is represented by the insolvency representative, while in other jurisdictions the estate is represented by the mass of creditors.]*

(f) “Consumer goods” means tangible assets that a person uses or intends to use for personal, family or household purposes;

(g) “Debtor” means a person that owes payment or other performance of a secured obligation and includes a secondary obligor such as a guarantor of a secured obligation. The

term includes for convenience of reference an assignor in an outright transfer of a receivable. The debtor may or may not necessarily be the grantor;

(h) “Debtor of the receivable” means a person liable for payment of a receivable and includes a guarantor or other person secondarily liable for payment of the receivable;

(i) “Encumbered asset” means a movable, tangible or intangible, asset that is subject to a security right. The term also includes for convenience of reference a receivable that has been the subject of an outright transfer;

(j) “Equipment” means a tangible asset used by a person in the operation of its business;

(k) “Future asset” means a movable asset, which does not exist or which the grantor does not own or have the power to encumber, at the time the security agreement is concluded;

(l) “Grantor” means a person that creates a security right to secure either its own obligation or that of another person, including [the enacting State to determine whether reference should be made also to a retention-of-title buyer and financial lessee]. The term also includes an assignor in an outright transfer of a receivable;

(m) “Insolvency representative” means a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or the liquidation of the insolvency estate;

(n) “Intangible asset” means all forms of movable assets other than tangible assets and includes incorporeal rights, receivables and rights to the performance of obligations other than receivables;

(o) “Inventory” means tangible assets held for sale or lease in the ordinary course of a grantor’s business, as well as raw and semi-processed materials (work-in-process);

(p) “Knowledge” means actual rather than constructive knowledge;

(q) “Mass or product” means tangible assets other than money that are so physically associated or united with other tangible assets that they have lost their separate identity;

(r) “Notice” means a communication in writing;

*[Note to the Working Group: In view of the definitions of the term “notice” in the Secured Transactions Guide and in the UNCITRAL Guide on the Implementation of a Security Rights Registry (the “Registry Guide”), the Working Group may wish to consider whether a new term should be introduced and defined in this article to reflect a notice to be registered in the general security rights registry (e.g. “registration notice” or “security right notice”), while the current definition of the term “notice” could be retained to refer to other types of notice (e.g., given in the context of enforcement).]*

(s) “Notification of the assignment” means a notice that reasonably identifies the assigned receivable and the assignee;

*[Note to the Working Group: The Working Group may wish to consider this definition states a substantive rule on the effectiveness of a notification of the assignment that is already addressed in article 82, paragraph 1.]*

(t) “Original contract” means, in the context of a receivable created by contract, the contract between the creditor and the debtor of the receivable from which the receivable arises;

(u) “Possession” means the actual possession only of a tangible asset by a person or an agent or employee of that person, or by an independent person that acknowledges holding it for that person. It does not include non-actual possession described by terms such as constructive, fictive, deemed or symbolic possession;

(v) “Priority” means the right of a person to derive the economic benefit of its security right in preference to a competing claimant;

(w) “Proceeds” means whatever is received in respect of encumbered assets, including what is received as a result of sale or other disposition or collection, lease or licence of an encumbered asset, proceeds of proceeds, civil and natural fruits, dividends,

distributions, insurance proceeds and claims arising from defects in, damage to or loss of an encumbered asset;

(x) “Receivable” means a right to payment of a monetary obligation, excluding a right to payment evidenced by a negotiable instrument, a right to receive the proceeds under an independent undertaking and a right to payment of funds credited to a bank account;

(y) “Regulation” means the body of rules adopted by the enacting State with respect to a registry for the purposes of receiving, storing and making accessible to the public information in registered notices with respect to security rights in movable assets[, whether these rules are found in administrative guidelines or the Law];

(z) “Right to receive the proceeds under an independent undertaking” means the right to receive a payment due, a draft accepted or deferred payment incurred or another item of value, in each case to be paid or delivered by the guarantor/issuer, confirmer or nominated person giving value for a draw under an independent undertaking. The term also includes the right to receive payment in connection with the purchase by a negotiating bank of a negotiable instrument or a document under a complying presentation. The term does not include:

(i) The right to draw under an independent undertaking; or

(ii) What is received upon honour of an independent undertaking;

(aa) “Secured creditor” means a creditor that has a security right. For convenience of reference, the term also includes an assignee in an outright transfer of a receivable;

(bb) “Secured obligation” means an obligation secured by a security right. [For convenience of reference, the term also includes the amount owing by the transferor in the case of an outright transfer of a receivable;]

*[Note to the Working Group: The Working Group may wish to note that the bracketed text is intended to facilitate the application of the articles of the draft Model Law that include a reference to the term “secured obligation” to an outright transfer of receivables. Alternatively, text should be included in all relevant articles to address their proper application to outright transfers of receivables (see, for example, article 5, subpara. 2 (c) below).]*

(cc) “Secured transaction” means a transaction that creates a security right. For convenience of reference, the term also includes an outright transfer of a receivable, without re-characterizing it as a secured transaction;

(dd) “Security agreement” means an agreement, in whatever form or terminology, between a grantor and a secured creditor that creates a security right. For convenience of reference, the term also includes an agreement for the outright transfer of a receivable;

(ee) “Security right” means a property right in a movable asset that is created by agreement and secures payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right. For convenience of reference, the term also includes the right of the assignee in an outright transfer of a receivable; and

(ff) “Tangible asset” means every form of corporeal movable asset, such as consumer goods, inventory and equipment.]

### [Article 3. Party autonomy

1. Except as otherwise provided in articles [...], the parties may derogate from or vary by agreement the provisions of this Law relating to their respective rights and obligations. Such an agreement does not affect the rights of any person that is not a party to the agreement.

2. The mutual rights and obligations of the parties to a security agreement are determined by:

(a) The terms and conditions set forth in the security agreement, including any rules or general conditions referred to therein; and

(b) Any usage to which the parties to the security agreement have agreed and any practices they have established between themselves.]

*[Note to the Working Group: The Working Group may wish to note that paragraph 1 of this article: (a) is based on article 6 of the Assignment Convention (the first part of which is based on article 6 of the CISG) and recommendation 10 of the Secured Transactions Guide (which refers to specific mandatory law recommendations); and (b) is intended to refer not only to the secured creditor and the grantor but also to other parties whose rights may be affected by the draft Model Law, such as the debtor of an encumbered receivable and a competing claimant, while ensuring that any person not party to such an agreement will not be affected. The Working Group may also wish to note that paragraph 2 of this article: (a) is based on article 11 of the Assignment Convention (which in turn is based on article 9 of the CISG) and recommendation 110 of the Secured Transactions Guide and (b) is intended to reiterate the principle that the parties to the security agreement may structure their agreement in any way they wish to meet their particular needs (as is done in articles 6 and 11 of the Assignment Convention, but not in articles 6 and 9 of the CISG); and (b) give legislative strength to trade usages agreed upon by the parties and trade practices established between them.]*

#### **Article 4. General standard of conduct**

1. A person must exercise its rights and perform its obligations under this Law in good faith and in a commercially reasonable manner.
2. The general standard of conduct set forth in paragraph 1 of this article cannot be waived unilaterally or varied by agreement at any time.

## **Chapter II. Creation of a security right and rights and obligations of the parties**

### **Section I. Creation of a security right**

#### **Article 5. Security agreement**

1. A security right is created by a security agreement in accordance with paragraphs 2 to 5 of this article.
2. A security agreement must:
  - (a) Provide for the creation of a security right;
  - (b) Identify the secured creditor and the grantor;
  - (c) Describe the secured obligation [except in the case of an outright transfer of receivables];
  - (d) Describe the encumbered assets in a manner that reasonably allows their identification[; and
  - (e) Indicate the maximum monetary amount for which the security right may be enforced].<sup>3</sup>
3. Subject to paragraph 4 of this article, the security agreement must be [contained in] [concluded in] [evidenced by] [contained or concluded in, or evidenced by] a writing that satisfies the minimum content requirements of paragraph 2 of this article and is signed by the grantor.
4. A security agreement may be oral if accompanied by a transfer of the possession of the encumbered asset to the secured creditor.

*[Note to the Working Group: The Working Group may wish to consider: (a) whether the bracketed text in subparagraph 2 (c) should be retained or the matter addressed in the definition of the term “secured obligation” (see article 2, subpara. (bb) above) and in the Guide to Enactment; and (b) whether the meaning of the terms “writing” and “signature” in an electronic context should be addressed in the Guide to Enactment by*

<sup>3</sup> This subparagraph should be included in the draft Model Law if the enacting State determines that an indication of the maximum monetary amount for which the security right may be enforced would be helpful to facilitate lending from another creditor.

*reference to recommendations 11 and 12 of the Secured Transactions Guide and/or in the definitions. The Working Group may wish to note that paragraph 1 is based on recommendation 13 of the Secured Transactions Guide, paragraph 2 on recommendation 14, and paragraphs 3 and 4 on recommendation 15.]*

#### **Article 6. Obligations that may be secured**

A security agreement may provide for a security right that may secure any type of obligation, whether present or future, determined or determinable, conditional or unconditional, or fixed or fluctuating.

#### **Article 7. Assets that may be encumbered**

1. A security agreement may provide for a security right in any type of asset, parts of assets and undivided rights in assets.
2. A security agreement may provide for a security right in future assets but the security right is not created until the grantor acquires rights in the assets or the power to encumber them.
3. A security agreement may provide for a security right in all assets or categories of assets of a grantor, without identifying them individually.

#### **Article 8. Proceeds**

1. A security right in an encumbered asset extends to its identifiable proceeds.
2. Where proceeds in the form of money or funds credited to a bank account have been commingled with other assets of the same kind so that the proceeds are no longer identifiable:
  - (a) The amount of the proceeds immediately before they were commingled is nevertheless to be treated as identifiable proceeds after commingling; and
  - (b) If, at any time after commingling, the total amount of the asset is less than the amount of the proceeds, the total amount of the asset at the time that its amount is lowest plus the amount of any proceeds later commingled with the asset is to be treated as identifiable proceeds.

#### **Article 9. Assets commingled in a mass or product**

1. A security right created in tangible assets before they were commingled in a mass or product continues in the mass or product.
2. A security right in tangible assets that continues in a mass or product pursuant to paragraph 1 of this article is limited in value to the value of the encumbered assets immediately before they became part of the mass or product.

### **Section II. Rights and obligations of the parties to a security agreement**

#### **Article 10. Obligation to preserve an encumbered asset**

A [party to a security agreement] [secured creditor] that is in possession of an encumbered asset must take reasonable steps to preserve the asset and its value.

*[Note to the Working Group: The Working Group may wish to consider whether, to ensure that this article would not result in preventing the grantor from selling the asset or in making it possible for the grantor to avoid this duty by relinquishing possession, the obligation to preserve the encumbered asset should be limited to the secured creditor (if the cost of preserving the encumbered asset exceeds its value, the secured creditor would normally not only relinquish possession but take other steps to address the lack of security). Alternatively, the matter could be addressed in the Guide to Enactment.]*



### **Article 11. Obligation of secured creditor to return an encumbered asset or register a cancellation notice**

If the secured obligation has been fully satisfied and all commitments to extend credit have been terminated, the secured creditor must return an encumbered asset in its possession to the grantor, or register a cancellation notice as provided in article 50.

*[Note to the Working Group: The Working Group may wish to consider whether this article or the Guide to Enactment should address the obligation of an assignee to withdraw the notification to the debtor of the receivable.]*

### **Article 12. Rights of a secured creditor with respect to an encumbered asset**

1. A secured creditor in possession of an encumbered asset is entitled:
  - (a) To be reimbursed for reasonable expenses incurred for the preservation of the asset;
  - (b) To make reasonable use of the asset; and
  - (c) To apply the monetary proceeds of the asset to the payment of the secured obligation.
2. A secured creditor is entitled to inspect an encumbered asset in the possession of the grantor [at all reasonable times] [in a reasonable manner].

*[Note to the Working Group: The Working Group may wish to consider whether the bracketed text in paragraph 2 of this article should be deleted as the obligation of the parties exercise their rights and perform their obligations in good faith and in a commercially reasonable manner is already addressed in article 4 (general standard of conduct).]*

## **Chapter III. Effectiveness of a security right against third parties**

### **Article 13. Methods of third-party effectiveness**

A security right is effective against third parties, if it has been created in accordance with article 5, paragraph 1, and:

- (a) A notice with respect to the security right that meets the requirements of articles 25, 39, 46, 47 and [...] is registered in the general security rights registry [or in a specialized registry or title certificate, if any]; or
- (b) The possession of the asset encumbered by the security right is transferred to the secured creditor.

*[Note to the Working Group: The Working Group may wish to consider whether subparagraph (a) of this article should refer to other articles setting forth requirements for a notice to achieve the third-party effectiveness of a security right.]*

### **Article 14. Automatic third-party effectiveness of a security right in proceeds**

1. If a security right in an encumbered asset is effective against third parties, a security right in any proceeds of the encumbered asset is effective against third parties without any new act when the proceeds arise or are acquired if:
  - (a) The proceeds are sufficiently described in the notice registered; or
  - (b) Consist of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account.

2. If a security right in an encumbered asset is effective against third parties, a security right in any proceeds other than those referred to in paragraph 1 of this article is effective against third parties:

(a) For [a short period of time to be specified by the enacting State] days after the proceeds arise; and

(c) Thereafter, if it is made effective against third parties by one of the methods referred to in article 13 before the expiry of the time period provided in subparagraph (a).

**[Article 15. Continuity in third-party effectiveness of a security right upon a change in the method of third-party effectiveness]**

1. A security right made effective against third parties by one of the methods referred to in article 13 may [subsequently] be made effective against third parties by another of those methods.

2. Even if there is a change in the method of third-party effectiveness, third-party effectiveness continues, provided that there is no time when the security right is not effective against third parties.]

**[Article 16. Lapse in third-party effectiveness]**

If third-party effectiveness of a security right lapses, it may be re-established by any of the methods referred to in article 13. In such a case, the security right is effective against third parties only as of the time of re-establishment.]

*[Note to the Working Group: The Working Group may wish to consider that articles 15 and 16 appear within square brackets for further consideration in view of the doubts expressed with respect to those articles at the 24th session of the Working Group (see A/CN.9/796, paras. 58-61). The Working Group may wish to consider whether articles 15 and 16 could be merged in one article.]*

**Article 17. Effect of a transfer of an encumbered asset**

Except as otherwise provided in this Law, a security right does not become ineffective as against third parties solely because the encumbered asset is transferred.

*[Note to the Working Group: The Working Group may wish to consider whether the rule that a security right follows an encumbered asset in the hands of a transferee fits more in the chapter on creation and the exceptions to this rule (authorization of the transfer by the secured creditor or transfer in the ordinary course of business of the transferor) in the chapter on priority, or whether both the rule and its exceptions should be included in the chapter on priority.]*

**Article 18. Continuity in third-party effectiveness upon change of the applicable law to this Law**

If a security right is effective against third parties under the law of another State whose law was applicable, and this Law becomes applicable, the following rules apply:

(a) The security right continues to be effective against third parties under this Law for [a short period of time to be specified by the enacting State] days after the change;

(b) The security right continues to be effective against third parties after the end of the time period referred to in subparagraph (a) if the third-party effectiveness requirements of this Law are satisfied prior to the end of that time period; and

(c) If the security right continues to be effective against third parties under subparagraph (a) and (b), the time when registration or third-party effectiveness was achieved for the purposes of the articles on priority is the time when it was achieved under the law of the other State.

*[Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that this article, which is based on recommendation 45 of the Secured Transactions Guide, is intended to apply to cases in which the draft Model Law becomes the applicable law by virtue of the conflict-of-laws rules of the forum (e.g., through a move of*

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*the location of the asset or the grantor to the enacting State) and is intended to give a secured creditor a grace period to ensure that the third-party effectiveness of its security right achieved under the previously applicable law continues under the draft Model Law (for a similar “transition” rule in the case of a change of the law of one and the same State, see rec. 231 of the Secured Transactions Guide).]*

**(A/CN.9/WG.VI/WP.59/Add.1) (Original: English)****Note by the Secretariat on a Draft Model Law  
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## **Chapter IV. The registry system**

### **Section I. Establishment of the security rights registry and appointment of the registrar**

#### **Article 19. Establishment of the security rights registry**

The security rights registry is established for the registration of notices with respect to security rights in accordance with this Law and the Regulation.

*[Note to the Working Group: The Working Group may wish to note that the term “Regulation” is defined in article 2. The Working Group may also wish to consider which of the definitions of the Registry Guide may need to be added to article 2. The Working Group may also wish to note that the Guide to Enactment will explain that the enacting State may establish the security rights registry under another law.]*

#### **Article 20. Appointment of the registrar**

The [the name of the appropriate executive or ministerial authority to be specified by the enacting State] is authorized to appoint and dismiss the registrar, and determine the registrar’s duties.

### **Section II. Access to registry services**

#### **Article 21. Public access to registry services, conditions and rejection of access**

1. The security rights registry is open to the public in accordance with this Law and the Regulation.
2. Any person may submit a notice to the registry for registration if that person:
  - (a) Uses the appropriate notice form prescribed by the [registrar] [Regulation];
  - (b) Identifies itself in the manner prescribed by the registrar; and
  - (c) Has paid, or made arrangements to pay to the satisfaction of the registrar, any fee prescribed by the [registrar] [Regulation].
3. Any person may submit a search request to the registry if that person:
  - (a) Uses the search request form prescribed by the [registrar] [Regulation]; and
  - (b) Has paid, or made arrangements to pay to the satisfaction of the registrar, any fee prescribed by the [registrar] [Regulation].
4. The reason for the rejection of access is communicated by the registrar to the registrant as soon as practicable.

*[Note to the Working Group: The Working Group may wish to consider whether both alternatives in square brackets in subparagraphs 2(a), 2(c), 3(a) and 3(b) of this article may be retained to leave it to each enacting State to determine whether these matters should be left to the registrar or settled in the Regulation. The Working Group may also wish to note that the term “registrar” is used instead of the term “registry” as the latter term is defined as a system and not as a person (the registrar may need to be defined to include the registry staff.)]*

### Article 22. Rejection of a notice or search request

1. The registration of a notice is rejected by the registrar if no information is entered in one or more of the required designated fields or if the information provided is not legible.
2. A search request is rejected by the registrar if no information is entered in at least one of the fields designated for entering a search criterion or if the information is not legible.
3. The reason for the rejection is communicated by the registrar to the registrant as soon as practicable.

### Article 23. No additional conditions to be imposed on access to registry services

1. Information about the registrant's identity is obtained from the registrant and maintained by the registrar in accordance with article 21, subparagraph 2 (b), but verification of that information is not required.
2. Evidence of the existence of the authorization of the person named in a notice as the grantor is not required for the registration of a notice.
3. Except as provided in article 22, the registrar does not reject the registration or conduct any scrutiny of the content of a notice submitted to the registry for registration.

*[Note to the Working Group: The Working Group may also wish to consider whether in this or other article of the draft Model Law, or in the Guide to Enactment, it should be indicated that, while the date and time of registration is maintained in the public record (see article 27, subpara. 2), the identity of the registrant is maintained in a part of the record of the registry that is not public. The Working Group may also wish to consider whether the identity of the registrant should be maintained in the archives after the notice to which it relates has been cancelled, removed from the public registry record and archived.]*

## Section III. Registration (general)

### Article 24. Grantor's authorization for registration

1. Registration of an initial notice is ineffective unless authorized by the grantor in writing, before or after registration.
2. Registration of an amendment notice is ineffective unless authorized by the grantor in writing, before or after registration, only if the amendment notice:
  - (a) Adds a description of new encumbered assets;
  - [(b) Increases the maximum amount for which the security right to which the registration relates may be enforced;]
  - (c) Adds a new grantor in which event the authorization of the new grantor is required unless the new grantor is a transferee of an encumbered asset described in a previously registered notice to which the amendment notice relates;
  - (d) [...].
3. [Unless otherwise agreed,] a written security agreement between the persons named in a notice as the grantor and the secured creditor, or a written agreement that amends their security agreement, is sufficient to constitute authorization for the registration of a notice covering the assets described therein.

*[Note to the Working Group: The Working Group may wish to note that the registration of an amendment notice that adds encumbered assets or increases the maximum amount may affect intervening secured creditors, and therefore takes effect only when the registration of the amendment notice (not the initial notice) becomes effective (see article 27 below). The Working Group may also wish to note that: (a) if an amendment notice adds encumbered assets that are the proceeds of encumbered assets described in a previously registered notice, there is no need to obtain the grantor's additional authorization, as the security right extends to proceeds by law (see article 8); and (b) if the proceeds are cash proceeds or are sufficiently described in a previously registered notice, there is no need to*

register an amendment notice (see article 14, para. 1). The Working Group may also wish to note that the bracketed text in paragraph 3, which was included at the request of the Working Group for further consideration (see A/CN.9/796), may not be necessary in view of the new text of article 3 on party autonomy.]

#### **Article 25. A notice may relate to more than one security right**

A single notice may relate to one or more than one security right arising under one or more than one security agreement between the secured creditor and the grantor identified in the notice.

*[Note to the Working Group: The Working Group may wish to consider whether in the text of this article or in the Guide to Enactment it should be pointed out that the registration of a single notice is sufficient to make effective against third parties a security right in encumbered assets that are not necessarily described in the notice, notably in cash proceeds (see article 14, para. 1).]*

#### **Article 26. Time when a notice may be registered**

1. An initial or amendment notice may be registered before or after the conclusion of the security agreement, or any agreement amending the security agreement, to which the notice relates.
2. A cancellation notice may be registered at any time.

#### **Article 27. Time of effectiveness of a registered notice**

1. The registration of an initial or amendment notice is effective from the date and time when the information in the notice is entered into the registry record so as to be accessible to searchers of the public registry record.
- [2. The date and time when the information in an initial or amendment notice is entered into the registry record so as to be accessible to searchers is indicated in the public registry record.
3. Information in initial or amendment notices is entered into the registry record as soon as practicable after the notices are submitted and in the order in which they were submitted.]
4. The registration of a cancellation notice is effective from the date and time when the information in any initial or amendment notice to which it relates is no longer accessible to searchers of the public registry record.
- [5. The date and time when the information in any initial or amendment notice to which a cancellation notice relates is no longer accessible to searchers is indicated in the registry record.]

*[Note to the Working Group: The Working Group may wish to consider whether paragraphs 2 and 5 of this article that appear within square brackets should be deleted, while the Guide to Enactment could explain that these matters should be addressed in the Regulation.]*

#### **Article 28. Period of effectiveness of a registered notice**

##### **Option A**

1. A registered notice is effective for [a period of time to be specified by the enacting State].
2. The period of effectiveness of a registered notice may be extended by the registration of an amendment notice indicating this intent in the designated field within [a period of time, such as six months, to be specified by the enacting State] before its expiry.
3. The registration of an amendment notice in accordance with paragraph 2 of this article extends the period of effectiveness for [the period of time specified in paragraph 1 of this article] beginning from the time the current period would have expired if the amendment notice had not been registered.

**Option B**

1. A registered notice is effective for the period of time indicated by the registrant in the designated field in the notice.
2. The period of effectiveness of a registered notice may be extended at any time before its expiry by the registration of an amendment notice that indicates in the designated field a new period of effectiveness.
3. The registration of an amendment notice in accordance with paragraph 2 of this article extends the period of effectiveness for the period of time specified in the amendment notice beginning from the time the current period would have expired if the amendment notice had not been registered.

**Option C**

1. A registered notice is effective for the period of time indicated by the registrant in the designated field in the notice, not exceeding [a maximum period of time to be specified by the enacting State].
2. The period of effectiveness of a registered notice may be extended within [a period of time, such as six months, to be specified by the enacting State] before its expiry by the registration of an amendment notice that indicates in the designated field a new period of effectiveness not exceeding [the maximum period of time specified in paragraph 1].
3. The registration of an amendment notice in accordance with paragraph 2 of this article extends the period of effectiveness for the period of time specified in the amendment notice beginning from the time the current period would have expired if the amendment notice had not been registered.

**Article 29. Organization of information in registered notices**

The registry record is organized so that:

- (a) A unique registration number is assigned to a registered initial notice and all registered amendment and cancellation notices that contain that number are associated with the initial notice in the registry record;
- (b) The information in a registered initial and in any associated registered notices can be retrieved by a search of the registry record that uses the identifier of the grantor or the registration number assigned to the initial notice as the search criterion;
- (c) The identifier and address of the person identified as the secured creditor in multiple registered notices can be amended by the registration of a single global amendment notice; and
- (d) The registration of an amendment or cancellation notice does not result in the deletion or modification of information contained in any associated registered notices.

*[Note to the Working Group: The Working Group may wish to consider whether a definition of the term "registration number" should be included in article 2.]*

**Article 30. Preservation of integrity of the information in registered notices**

1. Except as provided in articles 32 and 33, information contained in registered notices may not be amended or removed by the registrar from the registry record.
2. The information contained in registered notices is backed up so as to allow reconstruction in the event of loss or damage.

**[Article 31. Obligation to send a copy of a registered notice**

1. A copy of the information in a registered notice, indicating the date and time when the registration of the notice became effective and the registration number, is sent by the registrar to the person identified in the notice as the secured creditor at the address set forth in the notice, as soon as practicable after its registration.



2. Within [a short period of time, such as ten days, to be specified by the enacting State] after the person identified in a registered notice as the secured creditor has received a copy of a registered notice in accordance with paragraph 1 of this article, that person must send a copy of the registered notice to the person identified in the notice as the grantor at the address set forth in the notice, or if that person knows that the address has changed, at the most recent address known to that person or an address reasonably available to that person.]

*[Note to the Working Group: The Working Group may wish to note that, in view of the decision of the Working Group at its 24th session (see A/CN.9/796, para. 87), this article appears within square brackets for further consideration. The Working Group may also wish to consider whether this article should be split in two, one dealing with the obligation of the registrar and the other dealing with the obligation of the secured creditor. The Working Group may also wish to note that paragraph 2 of this article includes changes aimed at simplifying the rule contained in recommendation 18 of the Registry Guide, on which it is based.]*

### **Article 32. Removal of information from the public registry record and archival**

1. Information in a registered notice is removed from the public registry record upon the expiry of the period of effectiveness of the notice in accordance with article 28 or upon registration of a cancellation notice in accordance with article 46 or 47.
2. Information removed from the public registry record in accordance with paragraph 1 of this article is archived for a period of at least [a long period of time, such as, for example, twenty years, to be specified by the enacting State] in a manner that enables the information to be retrieved by the registry in accordance with article 29, subparagraph (b).

### **Article 33. Language in which information in a notice must be expressed**

The information contained in a notice must be expressed in [the language or languages to be specified by the enacting State] and in the character set determined and publicized by the registry.

*[Note to the Working Group: The Working Group may wish to consider whether this article should be retained or deleted and the matter addressed therein discussed in the Guide to Enactment. If the Working Group decides that this article should be retained, it may wish to consider its placement in the draft Model Law (for example, whether it should follow article 22, which provides that a notice that is illegible is rejected). Alternatively, the Working Group may wish to consider whether the article 41 should provide that where the information in a registered notice is not expressed in the required language or languages the registration of the notice is ineffective or ineffective if it would seriously mislead a reasonable searcher.]*

### **[Article 34. Correction of errors by the registrar**

1. If the registrar makes an error or omission in entering into the registry record the information contained in a paper notice submitted to the registry for registration or erroneously removes from the registry record all or part of the information contained in a registered notice, promptly after discovering the need for the correction or restoration, the registrar must

#### **Option A**

register a notice to correct the error or omission, or restore the erroneously removed information and send a copy of the notice to the secured creditor.

#### **Option B**

inform the secured creditor identified in the registered notice so as to enable the secured creditor to register a notice to correct the error or omission or restore the erroneously removed information.

2. If a notice referred to in paragraph 1 of this article is registered, it is effective

**Option A**

as of the time it becomes accessible to searchers of the registry record.

**Option B**

as of the time it becomes accessible to searchers of the registry record, except that the security right to which the notice relates retains the priority it would otherwise have under the Law over the right of a competing claimant that acquired its right prior to the registrar's error or omission or the registrar's erroneous removal of the information.

**Option C**

as if the error or omission had never been made or the information had never been erroneously removed.

**Option D**

as if the error or omission had never been made or the information had never been erroneously removed, except that the security right to which the notice relates is subordinate to the right of a competing claimant that would have priority if the notice were treated as effective only from the time of its registration and that acquired its right in reliance on a search of the registry record made before the notice was registered, provided the competing claimant did not have actual knowledge of the error or omission or the erroneous removal of the information at the time it acquired its right.]

*[Note to the Working Group: The Working Group may wish to note that the options set out in this article parallel, with the necessary modifications, the options set out in article 43, paragraph 3, dealing with the effectiveness of amendment or cancellation notices not authorized by the secured creditor. Accordingly, the Guide to Enactment will explain that an enacting State should take into account both articles in determining which option to adopt to ensure that the options selected are compatible.]*

**[Article 35. Liability of the registrar****Alternative A**

Any liability that the registrar may have under other law for loss or damage caused to a person by an error or omission in the administration or operation of the registry is limited to:

(a) An error or omission in a search result issued to a searcher or in a copy of a registered notice sent to the secured creditor [up to an amount of [maximum amount of liability to be specified by the enacting State]; and

(b) Loss or damage caused by an error or omission on the part of the registrar in entering or failing to enter into the registry record the information contained in a paper notice or in erroneously removing all or part of the information contained in a registered notice from the registry record [up to an amount of [maximum amount of liability to be specified by the enacting State]].

**Alternative B**

The registrar is not liable for loss or damage caused to a person by an error or omission in the administration or operation of the registry.]

*[Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that: (a) alternative A of this article is intended to leave the issue of the liability of the registrar (or the enacting State) for loss or damage caused by an error or omission in the administration or operation of the registry to other law of the enacting State and, if liability is foreseen by that other law, to limit that liability to the types of errors or omissions listed in alternative A (which may be covered by a compensation fund that the registrar or the enacting State may wish to establish and pay from the registry fees); and (b) alternative B is intended to exclude any liability of the registry (or the enacting State) for errors or omissions in relation to the administration or operation of the registry. The*

*Working Group may further wish to note that alternative A does not contemplate any liability for the alleged failure of the registry system to properly or completely enter information directly submitted by a registrant electronically since it would be impossible to prove that this was due to the fault of the system as opposed to the registrant's own error or omission but that the secured creditor is still protected since the registrar is obligated to send a copy of the registered notice to the secured creditor who can then verify the accuracy and completeness of the information. Finally, the enacting State may also wish to address liability for false or misleading information provided by the registrar or registry staff to registrants or searchers.]*

## **Section IV. Registration of initial notices**

### **Article 36. Information required in an initial notice**

An initial notice submitted to the registry for registration must contain the following items of information set out in the designated field for each item:

- (a) The identifier and address of the grantor [and any additional item of information that the enacting State may decide to permit or require to be entered to assist in uniquely identifying the grantor];
- (b) The identifier and address of the secured creditor or its representative; [and]
- (c) A description of the encumbered asset;
- [(d) The period of effectiveness of the registration;<sup>1</sup> and
- (e) A statement of the maximum amount for which the security right to which the registered notice relates may be enforced.]<sup>2</sup>

### **Article 37. Determination of grantor identifier**

1. Where the grantor is a natural person:
  - (a) [Subject to subparagraph 1(c) of this article, the] [The] identifier of the grantor is the name of the grantor, as it appears in [the official documents on the basis of which the grantor's name should be determined and the hierarchy among those official documents, to be specified by the enacting State];
  - (b) [The enacting State should specify the various components of the grantor's name that must be entered in the prescribed registry notice form and provide the designated fields for each component in the notice]; and
  - (c) [The enacting State should address the possibility that the name of the grantor as it appears in the relevant document or source specified in subparagraph 1(a) of this article may have been changed in accordance with applicable change of name law and whether, in this eventuality, it should specify that the new name of the grantor should be entered.]
2. Where the grantor is a legal person, the grantor identifier is the name of the grantor that appears in the most recent [document, law or decree to be specified by the enacting State] constituting the legal person.
3. [The enacting State should specify whether additional information must be entered in the designated field of the prescribed registry notice form in special cases, such as where the grantor is subject to insolvency proceedings, a trustee, or a representative of the estate of a deceased person.]

<sup>1</sup> This provision will be necessary, if the enacting State implements option B or C of article 28.

<sup>2</sup> This provision will be necessary, if the enacting State decides to require an indication in a registered notice of the maximum monetary amount for which the security right to which the notice relates may be enforced (see *Secured Transactions Guide*, rec. 57, subpara. (d)).

### **Article 38. Impact of a change of the grantor's identifier after registration**

1. If the grantor's identifier changes after a notice is registered and the secured creditor registers an amendment notice adding the new identifier of the grantor within [a short period of time, such as thirty days, to be specified by the enacting State] after the change, the security right to which the notice relates retains its third-party effectiveness and priority.

2. If the grantor's identifier changes after a notice is registered and the secured creditor registers an amendment notice adding the new identifier of the grantor after the expiration of the time period indicated in paragraph 1 of this article, the security right to which the notice relates is:

(a) Subordinate in priority to a competing security right with respect to which a notice is registered or which is otherwise made effective against third parties after the change in the grantor's identifier but before the registration of the amendment notice; and

(b) Ineffective against a person that buys, leases or licenses the encumbered asset after the change in the grantor's identifier but before the registration of the amendment notice.

*[Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that: (a) if the secured creditor registers the amendment notice during the "grace period" contemplated in paragraph 1 of this article, the third-party effectiveness and priority of its security right is preserved as against the categories of competing claimants described in this article even if they acquired their rights prior to the registration of the amendment notice; (b) while a secured creditor's failure to register an amendment notice adding the grantor's new identifier has the negative priority consequences against the categories of competing claimants described in this article, it does not prejudice the third-party effectiveness or priority of its security right as against other categories of competing claimants such as the grantor's insolvency representative; (c) while the "grace period" begins to run from the time of the name change regardless of whether or not the secured creditor actually knew about the name change before the expiry of that period, the later registration of an amendment notice will still protect the secured creditor as against the categories of competing claimants described in this article if their rights arise after the registration; and (d) an amendment notice must be registered for the purposes of the rules stated in this article only if the name change would make the registration irretrievable by a searcher using the new name of the grantor as the search criterion.]*

### **Article 39. Determination of secured creditor identifier**

1. Where the secured creditor is a natural person, the secured creditor identifier is the name of the secured creditor as it appears in [the official documents on the basis of which the secured creditor's name should be determined and the hierarchy among those official documents, to be specified by the enacting State].

2. Where the secured creditor is a legal person, the secured creditor identifier is the name of the secured creditor that appears in the most recent [document, law or decree to be specified by the enacting State] constituting the legal person.

3. [The enacting State should specify whether additional information must be entered in the designated field of the prescribed registry notice form in special cases, such as where the secured creditor is subject to insolvency proceedings, a trustee, or a representative of the estate of a deceased person.]

### **Article 40. Sufficient description of encumbered assets**

1. The encumbered assets must be described in the designated field of the notice in a manner that reasonably allows their identification.

2. A generic description that refers to all of the grantor's movable assets within a generic category includes all of the grantor's present and future assets within that category.

3. A generic description that refers to all of the grantor's movable assets includes all of the grantor's present and future movable assets.

**Article 41. Impact of errors in required information**

1. The secured creditor is responsible for ensuring that the information in a notice submitted to the registry for registration is set forth in the correct designated field in the notice and that the information is accurate and complete, and conforms to the requirements of the Law and the Regulation.
2. An incorrect statement of the grantor identifier in a notice does not render the registration of the notice ineffective if the notice would be retrieved by a search of the registry record using the grantor's correct identifier as the search criterion.
3. Except as provided in paragraph 4 of this article, an incorrect or insufficient statement of the information required in a notice other than the grantor's identifier does not render the registration of the notice ineffective unless the error would seriously mislead a reasonable searcher.
- [4. An incorrect statement in a notice with respect to the period of effectiveness of registration<sup>3</sup> or the maximum amount for which the security right may be enforced,<sup>4</sup> does not render a registered notice ineffective[, except to the extent it seriously misled third parties that relied on the information set out on the registered notice].]
5. An incorrect statement of the grantor identifier in a notice does not render the registration of the notice ineffective with respect to other grantors correctly identified in the notice.
6. An insufficient description of an encumbered asset in a notice does not render the registration of the notice ineffective with respect to other encumbered assets sufficiently described.

*[Note to the Working Group: The Working Group may wish to consider whether the bracketed text at the end of paragraph 4 (which comes from rec. 29, subpara. (c) of the Registry Guide, which in turn comes from rec. 66 of the Secured Transactions Guide) should be retained. While if the period of effectiveness or maximum amount indicated in the notice is greater or lower than it was actually intended, the notice is effective and third parties relying on the notice as it appears on the registry record are protected (this point may be clarified in the Guide to Enactment or in para. 4 of this article). In this respect, the Working Group may wish to note that the Guide to Enactment will explain that: (a) the reference to a reasonable searcher in paragraph 3 means that the "seriously misleading test" in this paragraph is objective (that is, it is not necessary for a competing claimant to establish that it was actually misled as a result of the error in order for an error that would be seriously misleading from the perspective of a reasonable searcher to render a registration ineffective); and (b) the reference in paragraph 4 to parties that actually relied to their detriment on an erroneously stated registration period or maximum amount in a registered notice means that the "seriously misleading test" in this paragraph is subjective (that is, a third party challenging the notice needs to establish that it was actually misled as a result of the error; see Secured Transactions Guide, chap. IV, paras. 84 and 96).]*

**Article 42. Impact of a transfer of an encumbered asset after registration****Option A**

1. If an encumbered asset covered by a registered notice is transferred after the notice is registered and the secured creditor registers an amendment notice adding the transferee's name as a new grantor within [a short period of time, such as thirty days, to be specified by the enacting State] after the transfer, the security right to which the notice relates retains its third-party effectiveness and priority.

<sup>3</sup> This provision will be necessary, if the enacting State implements option B or C of article 28.

<sup>4</sup> This provision will be necessary, if the enacting State decides to require an indication in a registered notice of the maximum monetary amount for which the security right to which the notice relates may be enforced (see *Secured Transactions Guide*, rec. 57, subpara. (d)).

2. If the secured creditor registers an amendment notice adding the transferee's name as a new grantor after the expiration of the time period indicated in paragraph 1 of this article, the security right to which the notice is:

(a) Subordinate in priority to a competing security right with respect to which a notice is registered or which is otherwise made effective against third parties after the transfer but before the registration of the amendment notice; and

(b) Ineffective as against the right of a person that buys, leases or licenses the encumbered asset after its transfer but before the registration of the amendment notice.

### **Option B**

1. If an encumbered asset covered by a registered notice is transferred after the notice is registered and the secured creditor registers an amendment notice adding the transferee's name as a new grantor within [a short period of time, such as thirty days, to be specified by the enacting State] after the transfer, the security right to which the notice relates retains its third-party effectiveness and priority.

2. If the secured creditor registers an amendment notice adding the transferee's name as a new grantor after expiration of the time period indicated in paragraph 1 of this article, starting when the secured creditor acquires knowledge about the transfer of the encumbered asset, the security right to which the notice relates:

(a) Is subordinate to a security right with respect to which a notice is registered or which is otherwise made effective against third parties after the transfer but before the registration of the amendment notice; and

(b) Is ineffective as against a right of a person that buys, leases or licenses the encumbered asset after its transfer but before the registration of the amendment notice.

### **Option C**

Registration of an initial or amendment notice in the security rights registry remains effective notwithstanding a transfer of the encumbered asset.

*[Note to the Working Group: The Working Group may wish to consider whether it should be clarified in this article or in the Guide to Enactment that this article does not apply to outright transfers of receivables. Outright transfers of receivables fall within the scope of the Law and the transferee must register in order to make its right effective against third parties in the same way as a secured creditor that acquires a security right in receivables.]*

## **Section V. Registration of amendment and cancellation notice**

### **Article 43. Secured creditor's authorization**

1. The person identified in the notice as the secured creditor may register an amendment or cancellation notice relating to that initial notice at any time.

2. In the case of a change in the secured creditor identified in a registered initial notice, the new secured creditor may register an amendment or cancellation notice relating to the initial notice at any time after the change.

### **Option A**

3. The registration of an amendment or cancellation notice is effective regardless of whether it was authorized by the secured creditor in writing or ordered by a judicial or administrative authority, before or after registration.

### **Option B**

3. The registration of an amendment or cancellation notice is effective regardless of whether it was authorized by the secured creditor in writing or ordered by a judicial or administrative authority, before or after registration, except that it does not affect the third-party effectiveness or priority of the security right to which it relates as against the right of

a competing claimant over which the security right had priority immediately before the registration of the amendment or cancellation notice.

### **Option C**

3. The registration of an amendment or cancellation notice is not effective if it was not authorized by the secured creditor in writing or ordered by a judicial or administrative authority, before or after registration.

### **Option D**

3. The registration of an amendment or cancellation notice is not effective if it was not authorized by the secured creditor in writing or ordered by a judicial or administrative authority, before or after registration, except that it does not affect the priority of the security right to which it relates as against the right of a competing claimant which would have priority if the registration were treated as effective and which was acquired in reliance on a search of the registry record made after the amendment or cancellation notice was registered provided the competing claimant did not have actual knowledge that the registration of the notice was unauthorized at the time it acquired its right.

*[Note to the Working Group: The Working Group may wish to note that the matter addressed in this article was not dealt with in the Secured Transactions Guide but it was discussed in the Registry Guide (paras. 258-268). The Working Group may also wish to consider whether options C and D of this article are compatible with the Secured Transactions Guide (rec. 74) and the Registry Guide (rec. 20), according to which upon registration of a cancellation notice, information contained in a registered notice is to be removed from the public registry record and archived.]*

## **Article 44. Information required in an amendment notice**

1. An amendment notice must contain the following items of information in the designated field for each item:
  - (a) The unique registration number assigned by the registry to the initial notice to which the amendment relates; and
  - (b) The information to be added, deleted or changed, as the case may be.
2. An amendment notice may relate to one or more than one item of information in a notice.

## **Article 45. Global amendment of secured creditor information**

### **Option A**

A person may register a single global amendment notice to amend its identifier and address in all registered notices in which it is identified as the secured creditor.

### **Option B**

A person may request the registrar to register a single global amendment notice to amend its identifier and address in all registered notices in which it is identified as the secured creditor.

*[Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that, if an enacting State adopts the first option stated in this article, it will need to establish special access procedures to enable a person to identify all notices in which it is named as the secured creditor and to register a global amendment notice, since the identifier of the secured creditor is not a search criterion generally available to the public for searching the public registry record.]*

## **Article 46. Information required in a cancellation notice**

A cancellation notice must contain in the designated field the unique registration number assigned by the registry to the initial notice to which the cancellation relates.

### **Article 47. Compulsory registration of an amendment or cancellation notice**

1. The secured creditor must register an amendment or cancellation notice, as the case may be, if:

(a) The registration of an initial or amendment notice has not been authorized by the grantor at all or the notice contains information that exceeds the scope of the grantor's authorization;

(b) The registration of an initial or amendment notice has been authorized by the grantor but the authorization has been withdrawn and no security agreement has been concluded;

(c) The security agreement to which the registered notice relates has been revised in a way that makes some or all of the information contained in the notice incorrect or insufficient and the grantor has not otherwise authorized the registration; or

(d) The security right to which the notice relates has been extinguished by payment or other performance of the secured obligation or otherwise and there is no further commitment by the secured creditor to extend credit secured by the encumbered assets to which the notice relates.

2. In a case falling within of subparagraphs 1(b) to (d) of this article, the secured creditor may charge the grantor any fee agreed between them for registering an amendment or cancellation notice.

3. Not later than [a short period of time, such as fifteen days, to be specified by the enacting State] days after receipt of a written request from the grantor, the secured creditor must comply with its obligation under subparagraph 1(a) of this article.

4. Notwithstanding paragraph 2 of this article, no fee or expense may be charged or accepted by the secured creditor for complying with a written request from the grantor sent in accordance with paragraph 3 of this article.

5. If the secured creditor does not comply with the grantor's request within the time period indicated in paragraph 3 of this article, the grantor is entitled to seek the registration of an amendment or cancellation notice, as the case may be, through [a summary judicial or administrative procedure to be established by the enacting State].

6. The grantor is entitled to seek the registration of an amendment or cancellation notice, as the case may be, in accordance with the procedure referred to in paragraph 5 even before the expiry of the time period indicated in paragraph 3 of this article.

7. An amendment or cancellation notice, as the case may be, ordered to be registered in accordance with the procedure referred to in paragraph 5 of this article is registered by

#### **Option A**

the registrar as soon as practicable after the notice is submitted to the registry for registration with a copy of the relevant judicial or administrative order attached.

#### **Option B**

the judicial or administrative officer who ordered the notice to be registered as soon as practicable after the issuance of the relevant judicial or administrative order with a copy thereof attached.

## **Section VI. Searches**

### **Article 48. Search criteria**

A search of the public registry record may be conducted according to:

(a) The identifier of the grantor; or

(b) The registration number assigned to the registered notice.



**Article 49. Search results****Option A**

1. A search result that indicates the date and time when the search was performed and either lists any registered notices that contain information that matches the search criterion provided by the searcher exactly and sets forth the registration history and all the information contained in these notices, or indicates that no registered notice contains information that exactly matches the search criterion provided by the searcher.

**Option B**

1. A search result that indicates the date and time when the search was performed and either lists any registered notices that contain information that matches the search criterion provided by the searcher exactly and closely, and sets forth the registration history and all the information contained in these notices, or indicates that no registered notice contains information that exactly or closely matches the search criterion provided by the searcher.

2. An official search certificate indicating the search result may be issued by the registrar at the request of the searcher.

*[Note to the Working Group: The Working Group may wish to consider whether references to close matches in this article should apply only to searches against the grantor identifier and not the registration number if the enacting States implements a close-match system. There does not seem to be a commercial or practical reason for close matches with respect to registration numbers. The Working Group may also wish to note that the Guide to Enactment will explain that if an enacting State chooses to implement the type of close match system contemplated by alternative B, the rules used by the registry for determining what constitutes a close match should be specified and publicized.]*



## IV. ELECTRONIC COMMERCE

### A. Report of the Working Group on Electronic Commerce on the work of its forty-eighth session (Vienna, 9-13 December 2013)

(A/CN.9/797)

[Original: English]

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### I. Introduction

1. At its forty-second session, in 2009, the Commission requested the Secretariat to prepare a study on electronic transferable records in the light of proposals received at that session (A/CN.9/681 and Add.1, and A/CN.9/682).<sup>1</sup>

2. At its forty-third session, in 2010, the Commission had before it additional information on the use of electronic communications for the transfer of rights in goods, with particular regard to the use of registries for the creation and transfer of rights (A/CN.9/692, paras. 12-47). At that session, the Commission requested the Secretariat to convene a colloquium on relevant topics, namely, electronic transferable records, identity management, electronic commerce conducted with mobile devices and electronic single window facilities.<sup>2</sup>

3. At its forty-fourth session, in 2011, the Commission had before it a note by the Secretariat (A/CN.9/728 and Add.1) summarizing the discussions during the colloquium on electronic commerce (New York, 14-16 February 2011).<sup>3</sup> After discussion, the Commission mandated the Working Group to undertake work in the field of electronic transferable records.<sup>4</sup> It was recalled that such work would be beneficial not only for the generic promotion of electronic communications in international trade, but also to address some specific issues such as assisting in the implementation of the United Nations Convention on the Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the “Rotterdam Rules”).<sup>5</sup> In addition, the Commission agreed that work regarding electronic transferable records might include certain aspects of other topics such as identity management, use of mobile devices in electronic commerce and electronic single window facilities.<sup>6</sup>

4. At its forty-fifth session (Vienna, 10-14 October 2011), the Working Group began its work on various legal issues relating to the use of electronic transferable records, including possible methodology for future work by the Working Group (A/CN.9/737, paras. 14-88).

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<sup>1</sup> *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, para. 343.

<sup>2</sup> *Ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 250.

<sup>3</sup> Information about the colloquium is available at the date of this document from [www.uncitral.org/uncitral/en/commission/colloquia/electronic-commerce-2010.html](http://www.uncitral.org/uncitral/en/commission/colloquia/electronic-commerce-2010.html).

<sup>4</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 238.

<sup>5</sup> *Ibid.*, para. 235.

<sup>6</sup> *Ibid.*

It also considered the work of other international organizations on that subject (A/CN.9/737, paras. 89-91).

5. At its forty-fifth session, in 2012, the Commission expressed its appreciation to the Working Group for the progress made and commended the Secretariat for its work.<sup>7</sup> There was general support for the Working Group to continue its work on electronic transferable records and the need for an international regime to facilitate cross-border use of electronic transferable records was emphasized.<sup>8</sup> In that context, the desirability of identifying and focusing on specific types of or specific issues related to electronic transferable records was mentioned.<sup>9</sup> After discussion, the Commission reaffirmed the mandate of the Working Group relating to electronic transferable records and requested the Secretariat to continue reporting on relevant developments relating to electronic commerce.<sup>10</sup>

6. At its forty-sixth session (Vienna, 29 October-2 November 2012), the Working Group continued its examination of the various legal issues that arose during the life cycle of electronic transferable records (A/CN.9/761, paras. 24-89). The Working Group confirmed the desirability of continuing work on electronic transferable records and the potential usefulness of guidance in that field. It was widely felt that generic rules based on a functional approach should be developed encompassing various types of electronic transferable records (A/CN.9/761, paras. 17-18). As to future work, broad support was expressed for the preparation of draft provisions on electronic transferable records to be presented in the form of a model law, without prejudice to the decision to be made by the Working Group on the final form (A/CN.9/761, paras. 90-93).

7. At its forty-seventh session (New York, 13-17 May 2013), the Working Group had the first opportunity to consider the draft provisions on electronic transferable records. It was reaffirmed that the draft provisions should be guided by the principles of functional equivalence and technology neutrality, and should not deal with matters governed by the underlying substantive law (A/CN.9/768, para. 14). As to future work, it was noted that while the draft provisions were largely compatible with different outcomes that could be achieved, caution should be exercised to prepare a text that had practical relevance and supported existing business practices, rather than regulated potential future ones (A/CN.9/768, para. 112).

8. At its forty-sixth session, in 2013, the Commission noted that the work of the Working Group would greatly facilitate electronic commerce in international trade.<sup>11</sup> After discussion, the Commission reaffirmed the mandate of the Working Group and agreed that work towards developing a legislative text in the field of electronic transferable records should continue.<sup>12</sup> It was further agreed that whether that work would extend to identity management, single windows and mobile commerce would be assessed at a future time.<sup>13</sup>

## II. Organization of the session

9. The Working Group, composed of all States members of the Commission, held its forty-eighth session in Vienna from 9 to 13 December 2013. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Brazil, Bulgaria, China, Colombia, Denmark, Ecuador, France, Germany, Hungary, Indonesia, Iran (Islamic Republic of), Italy, Japan, Kuwait, Pakistan, Panama, Paraguay, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, Ukraine and United States of America.

10. The session was also attended by observers from the following States: Belgium, Bolivia (Plurinational State of), Chile, Cuba, Czech Republic, Dominican Republic, Malta,

<sup>7</sup> *Ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 82.

<sup>8</sup> *Ibid.*, para. 83.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*, para. 90.

<sup>11</sup> *Ibid.*, *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 227.

<sup>12</sup> *Ibid.*, paras. 230 and 313.

<sup>13</sup> *Ibid.*, para. 313.

Mozambique, Portugal, Qatar, Romania, Sweden and United Arab Emirates. The session was also attended by observers from the European Union.

11. The session was also attended by observers from the following international organizations:

(a) *Intergovernmental organizations*: World Customs Organization (WCO);

(b) *International non-governmental organizations*: Comité Maritime International (CMI), European Law Student Association (ELSA), European Multi-Channel and Online Trade Association (EMOTA), Fédération Internationale des Associations de Transitaires et Assimilés (FIATA) and Institute of Law and Technology (Masaryk University).

12. The Working Group elected the following officers:

*Chairman*: Sr. Agustín MADRID PARRA (Spain)

*Rapporteur*: Mr. Dusán HORVÁTH (Hungary)

13. The Working Group had before it the following documents: (a) Annotated provisional agenda (A/CN.9/WG.IV/WP.123); (b) A note by the Secretariat on draft provisions on electronic transferable records (A/CN.9/WG.IV/WP.124 and Add.1); and (c) A note by the Secretariat on legal issues relating to the use of electronic transferable records (A/CN.9/WG.IV/WP.125).

14. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of the draft provisions on electronic transferable records.
5. Technical assistance and coordination.
6. Other business.
7. Adoption of the report.

### III. Deliberations and decisions

15. The Working Group engaged in discussions on the draft provisions on electronic transferable records. The deliberations and decisions of the Working Group are reflected in chapter IV below. The Secretariat was requested to revise the draft provisions to reflect those deliberations and decisions.

### IV. Draft provisions on electronic transferable records

#### Draft article 1. Scope of application

16. Different views were expressed on whether to retain the word “corresponding” in paragraph 2. It was suggested that inclusion of that word would establish a link between a paper-based transferable document or instrument and an electronic transferable record that performed the same functions. It was added that the link would be better established by placing that word before “electronic transferable record”. In response, it was explained that the substantive law would determine its applicability to the electronic transferable record, and that therefore the word “corresponding” should be deleted as it could be misleading. After discussion, the Working Group agreed to delete the word “corresponding” in paragraph 2.

17. It was indicated that paragraph 3 aimed at allowing the application of the draft provisions also to electronic transferable records that existed only in an electronic environment, without interfering with their substantive law. It was clarified that paragraph 3 would not be necessary in jurisdictions where no such electronic transferable record existed. It was further indicated that a decision on paragraph 3 could be made only in light

of the final form of the draft provisions, which was still undetermined. It was therefore decided that paragraph 3 would be retained in square brackets, pending discussion on the definition of electronic transferable record.

### **Draft article 2. Exclusions**

18. The Working Group agreed to retain paragraph 1 outside square brackets, as a similar provision had proven useful in the enactment of the UNCITRAL Model Law on Electronic Commerce.

19. It was said that the term “financial instrument” contained in paragraph 2 was too broad as it could encompass certain types of paper-based transferable document or instrument. It was explained that the rationale behind paragraph 2 was to exclude instruments of an investment nature. It was suggested that paragraph 2 should refer instead to “stocks, bonds and other investment instruments”. It was added that the reference to “other investment instruments” could include derivative instruments, money market instruments and any other financial product available for investment.

20. It was indicated that, if the final form of the draft provisions were to be a treaty, certain paper-based transferable documents or instruments should also be excluded from its scope of application in order to avoid conflicts with other treaties such as the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 1931) (the “Geneva Conventions”) (see paras. 109-112 below).

### **Draft article 3. Definitions**

21. While it was agreed that other definitions contained in draft article 3 should be examined in the context of the respective relevant draft article, the Working Group had a discussion about the definitions of “electronic transferable record” and “paper-based transferable document or instrument”.

22. A number of suggestions were made with regard to both definitions. One was that the two definitions should be aligned closely. Another was that both definitions should include a reference to the “title or right” rather than merely making a reference to the “right to claim performance of obligation”. With regard to the words “specified” or “incorporated”, it was noted that “incorporated” was often understood as a notion referring to tangible goods. It was added that a right would not be specified in the document or instrument as substantive law would be the source of such right, and therefore the word “incorporated” would be more appropriate than the word “specified”. It was indicated that the word “specified” referred to the performance obligation and not the relevant rights. In response to a question on what was meant by “transferable”, it was mentioned that whether a document or instrument was transferable or negotiable was an issue of substantive law not dealt with in the draft provisions.

23. With respect to the definition of “electronic transferable record”, it was stated that “transferring the right to performance of obligation” was only one of the functions of an electronic transferable record. Other functions included evidencing the obligation and identifying who had the right to performance. A suggestion was made that the definition should focus on the fact that the holder of the electronic transferable record would be entitled to claim the performance of obligation. Another suggestion was that the definition should convey the three key functions of transferability, title to property and right to performance of obligation. Yet another suggestion was to define electronic transferable record as the electronic equivalent of a paper-based transferable document or instrument, or as an electronic record that served the same functions as a paper-based transferable document or instrument. In that context, the Working Group recalled that the current definition of electronic transferable record had been broadened and thus was not in line with the definition of paper-based transferable document or instrument, in order to cover instruments that existed only in an electronic environment.

24. With respect to the definition of “paper-based transferable document or instrument”, the Working Group recalled that the definition originated from article 2, paragraph 2 of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (the “Electronic Communications Convention”). Yet, a

suggestion was made that it should focus on the fact that a paper-based transferable document or instrument was capable of transferring rights specified in that document or instrument (in line with the definition of electronic transferable record) and that this could be done by delivery with or without endorsement. As to the first point, it was mentioned that “being capable of transferring rights” implied that the holder was entitled to the rights embodied. With respect to the second point, it was noted that the method of transferring the rights was a matter of substantive law and need not be reflected in the definition. While another suggestion was to delete the definition of “paper-based transferable document or instrument”, it was noted that there was a need to retain the definition in order to reflect the underlying rule that the law governing paper-based transferable documents or instruments was not affected by the draft provisions as stated in article 1, paragraph 2. It was further noted that certain draft articles contained reference to paper-based transferable documents or instruments (e.g., draft article 23).

25. Another suggestion was to include a list of paper-based transferable documents or instruments to be covered. In response, it was noted that such an approach could unnecessarily limit the scope of the draft provisions and that defining the term in a generic manner would be more appropriate. However, it was added that there was merit in including an indicative list of examples either in the definition or in the commentary.

26. It was generally agreed that there was a need to align the definitions of “paper-based transferable document or instrument” and “electronic transferable record” by including both the “transferability” and the “entitlement” aspects. It was also agreed that the definition of “paper-based transferable document or instrument” could include an indicative list of examples, while whether those examples would be retained in the definition or in the commentary would be discussed at a later stage. The Secretariat was requested to provide a revised draft of the definitions in square brackets for further discussion.

27. In that context, a question was raised with regard to the applicability of the draft provisions to straight (non-transferable) bills of lading and other non-transferable documents or instruments. It was noted that even though such a document or instrument would not be transferable, there might be merit in applying the draft provisions to such document or instrument, as requirements for “possession” and “delivery” discussed in the draft provisions might be required for its use. In response, it was stated that the current definitions presupposed the exclusion of such instruments by making reference to “transferable” and that the Working Group should focus on documents or instruments that were intended to be transferred.

28. After discussion, the Working Group agreed that straight (non-transferable) bills of lading and other non-transferable documents or instruments should not be covered within the definitions of “electronic transferable record” and “paper-based transferable document or instrument” and thus were outside the scope of the draft provisions. It was also agreed that the draft provisions should only focus on “transferable” documents, instruments or records in accordance with the mandate given by the Commission to the Working Group.

#### **Draft article 4. Interpretation**

29. It was said that the reference to “general principles” contained in paragraph 2 should be further explained in order to provide adequate guidance. In that respect, it was clarified that those general principles referred to the law governing electronic communications, and not to the law governing paper-based transferable documents or instruments. After discussion, the Working Group decided to retain draft article 4, subject to further explanation of its content and operation.

#### **Draft article 5. Party autonomy**

30. It was indicated that parties should be allowed to derogate from and vary any article of the draft provisions as this was necessary, inter alia, to ensure adaptability to technological developments. In that respect, it was noted that some draft provisions referred to not yet existing procedures and processes, and that therefore it would be inappropriate to limit the parties’ ability to adjust to future developments. It was further noted that draft article 5 referred not only to party autonomy but also to privity of contract, which should be reflected

in the title of the draft article. It was added that the provisions of mandatory nature contained in substantive law would in any case not be affected by the draft provisions.

31. It was noted that the draft provisions worked together as a set to provide minimum requirements for functional equivalence and that the parties should only be allowed to derogate from the draft provisions in its entirety and not just some provisions because if only some provisions were derogated from, the remaining provisions would not be sufficient to achieve functional equivalence. It was also noted that draft article 13 provided that a person's consent would be required for the use of electronic transferable records, and therefore the purpose of draft article 5 might already be achieved through draft article 13.

32. The Working Group agreed to retain draft article 5 in square brackets and to indicate those draft articles that would not be subject to party autonomy.

#### **Draft article 6. Information requirements**

33. The Working Group decided to retain draft article 6 in its current form.

#### **Provisions on electronic transactions (draft articles 7-10)**

34. It was widely felt that draft articles 7 to 10 could be retained in a separate section as currently presented in A/CN.9/WG.IV/WP.124. It was also mentioned that the principle of party autonomy would be applicable to those articles as parties should be able to derogate from them.

#### **Draft article 7. Legal recognition of an electronic transferable record**

35. Noting that draft article 7 stated the principle of non-discrimination, the Working Group agreed to retain it in its current form.

#### **Draft article 8. Writing**

36. Recalling that draft articles 8 and 9 were based on provisions adopted by UNCITRAL for establishing minimum standards on form requirements, the Working Group examined the terminology used in those provisions, mainly "data message" and "electronic communication". It was recalled that the Electronic Communications Convention included a definition of "electronic communication" establishing a link between the notions of "communication" and "data message".

37. It was widely felt that draft article 8 should also apply when "information" was required to be in writing, as information might not necessarily be communicated. It was further suggested that the draft provisions should focus on the use of electronic transferable records and therefore it would be sufficient to state that the written form requirement was met when information contained in or related to the electronic transferable record was accessible so as to be usable for subsequent reference.

38. Yet another suggestion was to delete the words "with respect to the use of an electronic transferable record" in order to formulate draft article 8 as a general rule on written form requirement. That suggestion was objected to as being too broad and one that should be contained in the general electronic transactions law.

39. After discussion, the Working Group agreed to delete the word "[communication]", to remove the square brackets around the word "information", to delete the words "by [an electronic communication][an electronic record]" and to request the Secretariat to revise the words "contained therein".

#### **Draft article 9. Signature**

40. While it was noted that the UNCITRAL Model Law on Electronic Signatures contained a two-tier approach in article 6, paragraph 3, it was agreed that such an approach would not be required in the draft provisions and that draft article 9 should mirror article 9, paragraph 3, of the Electronic Communications Convention.

41. With regard to the first set of square brackets, it was widely felt that the words "a signature of a person" were more appropriate for the purposes of the draft provisions.



42. With regard to the second and third sets of square brackets, a suggestion was made that they could be deleted entirely by including the word “relevant” in front of the word “information” in subparagraph (a) and replacing the third set of square brackets with the words “the information”. That suggestion was objected to as the term “relevant” could be understood as referring to some of the information contained in the electronic record and not to the entire record. It was further noted that the word “intention” was sufficient to link the person and the relevant information. Therefore, it was agreed to delete the words “the communication” and to retain the words “the electronic record” outside square brackets in the second and third sets of square brackets.

43. In that context, the Working Group examined the definition of the term “electronic record” as provided in draft article 3. While support was expressed for that definition, it was noted that that definition was not different from the definition of “data message” contained in the Model Law on Electronic Commerce and in the Electronic Communications Convention. Therefore, in order to distinguish the term “electronic record” from the term “data message” and to highlight the fact that other information might be associated with the electronic transferable record at the time of issuance or thereafter (e.g., information related to endorsement), a suggestion was made that the definition of “electronic record” should be recast to “information generated, communicated, received, and/or stored by electronic means, including all information logically associated or otherwise linked together, whether generated contemporaneously or not”. It was explained that such a definition would also be in line with the definition of “electronic transport record” provided in article 1, paragraph 18, of the Rotterdam Rules. While there was support for that suggestion, it was noted that the definition should clarify that not all electronic records included a set of composite information. Therefore, it was suggested to revise the proposed definition along the following lines: “information generated, communicated, received, and/or stored by electronic means, which may, where appropriate, include all information logically associated or otherwise linked together, whether generated contemporaneously or not”.

44. Another proposal was to add the words “endorsed” and “archived” in the current definition of “electronic records” contained in draft article 3 in order to capture the rationale behind the proposed revised definition of “electronic record” (see para. 43 above) without introducing non-legal terminology.

45. After discussion, the Working Group agreed to add the words “which may, where appropriate, include all information logically associated or otherwise linked together, whether generated contemporaneously or not” in square brackets after the current definition of “electronic record” in draft article 3.

46. During the discussion of draft articles 8 and 9, a question was raised with regard to the appropriateness of the words “or provides consequences for the absence of” in both articles. It was stated that there would be no “requirement” that could be met if the law only provided consequences for the absence of a writing. It was suggested that the words “where the law explicitly or implicitly requires” should be used instead. In response, it was recalled that article 6, paragraph 1, and article 7, paragraph 1, of the Model Law on Electronic Commerce referred to explicit requirements in the law, while the notion of implicit requirement (whereby the law only provided the consequences for not meeting the requirement) was dealt with in paragraph 2 of both articles. It was further recalled that the current drafting was based on article 9, paragraphs 2 and 3, of the Electronic Communication Convention, which aimed at covering both instances. After discussion, the Working Group decided to retain the current structure of draft articles 8 and 9.

#### **Draft article 10. Original**

#### **Draft article 11. Uniqueness**

#### **Draft article 12. Integrity**

47. It was said that the need for a rule on the functional equivalence of a paper-based original in draft article 10 could be related to enabling the issuance of multiple originals, as envisaged in draft article 14, paragraph 4. It was added that the notion of “original” in the context of electronic transferable records was different from that adopted in other UNCITRAL texts on electronic commerce. It was decided that draft article 10 would be discussed in conjunction with draft article 14, paragraph 4.

48. With respect to draft article 11, it was indicated that the notion of uniqueness was not a necessary requirement for all electronic transferable records, and it was suggested that the draft article should be redrafted accordingly. It was further explained that in some cases, the notion of control could suffice to prevent the risk of exposing the debtor to multiple requests for performance. It was also noted that the notion of “reliable method” contained in draft article 11, paragraph 1 did not provide sufficient guidance.

49. In response, it was indicated that the notion of uniqueness was a key feature of electronic transferable records. It was added that that notion provided for identifying with certainty the content of the obligation, but not the parties thereto.

50. After its consideration of draft article 17 (see paras. 75-90 below), the Working Group resumed its discussion on draft articles 10, 11 and 12. It was reiterated that the notion of uniqueness was not a general requirement for electronic transferable records (see para. 48 above) and that in practice, it could be very difficult to achieve uniqueness in an electronic environment. It was stressed that uniqueness should not be perceived as a quality on its own and that emphasis should rather be on the function that uniqueness achieved, namely, prevention of multiple claims. In that line, it was mentioned that there were various methods to replicate that function in an electronic environment without necessarily requiring uniqueness. There was general support for those ideas. Consequently, a suggestion was made that draft article 10 could read as follows: “A reliable method shall be employed to render the electronic transferable record identifiable as such and to prevent its unauthorized replication.” That suggestion received support.

51. It was also suggested that draft articles 10 and 11 should be merged to provide a technology-neutral rule on functional equivalence of “original”. In response, a concern was raised that draft article 10 and draft articles 11 and 12 served different purposes. While draft article 10 provided a functional equivalent of “original”, draft articles 11 and 12 set out a reliability test for establishing control of an electronic transferable record. It was further stated that the deletion of draft articles 11 and 12 would undermine the operation of draft article 17 on control.

52. After discussion, it was suggested that draft article 10 should be revised as follows: “Where the law requires the original of a paper-based transferable document or instrument, or provides consequences for the absence of the original, that requirement is met with respect to the use of an electronic transferable record if a reliable method is employed: (a) to provide assurance that the electronic transferable record retains its integrity from the time when it was first generated in its final form; and (b) to render the electronic transferable record unique, or to identify the electronic transferable record as containing the authoritative information constituting the electronic transferable record” (hereinafter the “revised draft article 10”). It was explained that such a rule would provide for functional equivalence of “original” incorporating the elements of integrity and uniqueness contained in draft articles 11 and 12. It was further explained that the wording of subparagraph (b) in the revised draft article 10 departed from that of article 8 of the Model Law on Electronic Commerce and article 9 of the Electronic Communications Convention because of the different notion of “original” in the context of electronic transferable records (see para. 47 above).

53. A concern was raised with respect to the words “the original” in the revised draft article 10. It was explained that substantive law generally included a reference to the paper-based transferable document or instrument itself without explicitly requiring it to be “the original” and that “the original” status of the paper-based transferable document or instrument was generally assumed rather than explicitly stipulated. Therefore, it was suggested to delete the words “the original of” from the revised draft article 10.

54. In that respect, it was noted that “the law” in the revised draft article 10 should be understood broadly and in a manner similar to the word “the law” in article 9 of the Electronic Communications Convention, which referred to various sources of law and intended to encompass not only statutory or regulatory law but also judicially created law and other procedural law.

55. Another view was that the words “the original” did not pose a challenge. It was said that certain legislations contained a formal requirement for an original, and that legislations that did not contain an explicit stipulation for an original nonetheless implicitly required an

original by providing for consequences for the absence of an original. It was stated that a rule of functional equivalence should therefore be provided. It was further stated that requirements for the original also existed in current business practice.

56. After discussion, it was agreed that the words “the original” in the revised draft article 10 should be placed in square brackets for possible clarification or redrafting.

57. Another concern was that the notion of “original” should be understood to be distinct from the notion of “uniqueness”. It was also noted that the word “unique” might be problematic to implement in practice and could give rise to difficulties of interpretation, and thus no reference should be made to the electronic transferable record being unique in the revised draft article 10. To accommodate that concern, a suggestion was made that subparagraph (b) might be drafted along the following lines: “to render the electronic transferable record identifiable as such and to prevent its unauthorized replication” (see para. 50 above).

58. As to the formulation of draft articles 10, 11 and 12, various suggestions were made. One was that draft article 11, paragraph 2, and draft article 12, paragraph 2, could be merged with the revised draft article 10, there being no need to retain three separate articles. It was stated that the merged text would provide a functional equivalence rule for the “original” requirement and that the notions of uniqueness and integrity were notions that supported such a rule. It was also suggested that rules relating to the issuance of multiple originals could be formulated as a separate article (see para. 47 above).

59. It was noted that, when considering draft article 17 on control, the Working Group had postponed the discussion on whether there should be a link between the notion of control and the notions of uniqueness and integrity with respect to the reliability test (see paras. 85-90 below). It was therefore indicated that if draft articles 11 and 12 were to be merged with the revised draft article 10, draft article 17 would need to contain those elements of draft articles 11 and 12 that could no longer be referred to. Another suggestion was that draft articles 10, 11 and 12 should be retained separately. Yet another suggestion was that draft articles 10, 11 and 12 should be recast to two draft articles, one providing a functional equivalence rule for “original” and dealing with multiple originals and another providing the reliability test for uniqueness and integrity.

60. After discussion, the Working Group agreed to revise and place in square brackets draft article 10, taking into consideration the suggestions mentioned above (see paras. 50-59 above).

#### **Time and place of dispatch and receipt**

61. It was suggested that the draft provisions should include rules on the time and place of dispatch and receipt of electronic communications in conjunction with the use of electronic transferable records. It was explained that those rules would not interfere with substantive law. It was added that article 10 of the Electronic Communications Convention could provide a useful starting point for drafting such rules. In response, it was said that the actual need for such rules might be better assessed after the discussion of draft article 17 on control.

#### **Draft article 13. Consent to use an electronic transferable record**

62. After discussion, the Working Group agreed to remove the square brackets in paragraph 1 and to delete paragraph 2. It was explained that those changes were of an editorial nature and were not meant to affect the operation of the draft article with respect to legal requirements, on the one hand, and consent of the parties, on the other hand.

63. The Working Group agreed to retain paragraph 3 in its current form.

#### **Draft article 14. Issuance of an electronic transferable record**

64. It was said that paragraph 1 was superfluous as it reiterated the rule already contained at a general level in draft article 13, paragraph 1. Consequently, the Working Group agreed to delete paragraph 1.

65. While it was recalled that paragraph 2 was included to specifically deal with the possibility of issuing an electronic transferable record to bearer, it was stated that paragraph 2 should be deleted as it reiterated the general principle stated in article 1, paragraph 2. It was agreed that the accompanying text to draft article 1, paragraph 2, should specify that electronic transferable records may be issued to the bearer when permitted under substantive law.

66. It was agreed that paragraph 3 should be moved to draft article 17 on control.

67. It was indicated that the definition of “issuance” contained in draft article 3 did not establish a functional equivalence of the notion of “issuance” in the paper-based environment as it merely referred to draft articles 14 and 17. In response, it was said that the definition of “issuance” was drafted so as to fully respect substantive law, which would set forth requirements for issuance. It was added that the draft provisions did not contain a functional equivalence rule for “issuance”.

68. It was recalled that paragraph 4 was closely related to draft article 10 (see para. 47 above). In that context, it was indicated that the practice of issuing multiple originals of paper-based negotiable transport documents still existed and that one reason was to safeguard against loss of an original, but other reasons for that practice still needed to be ascertained. It was also indicated that the draft provisions should facilitate the continuation of existing practices and therefore it would be prudent to include a provision on the issuance of multiple originals, unless the industry requested that such practice should not be permitted to continue in an electronic environment.

69. The Working Group agreed to defer consideration of paragraph 4, which would need to be considered in conjunction with draft article 10, pending the compilation of further information on existing practices relating to the issuance of multiple originals.

#### **Draft article 15. Additional information in an electronic transferable record**

70. It was said that the use of electronic transferable records required the inclusion of information, such as a unique identifier, that might not be found on paper-based equivalents. Broad support was expressed for the principle of non-discrimination in draft article 7, which provided the rationale for paragraph 1. However, concerns were raised that paragraph 1 could be interpreted as preventing the inclusion of such additional information. A suggestion was made that paragraph 1 could be reflected in the text accompanying draft article 7 and consequently be deleted.

71. In response, it was indicated that the possibility of including additional information that related to the nature of the electronic transferable record, including technical information, was meant to be covered under paragraph 2, while paragraph 1 aimed at ensuring that electronic transferable records were not discriminated vis-à-vis their paper-based equivalents with regard to substantive information requirements. For instance, it was explained, a law should not contain a requirement to sign an amendment to an electronic transferable record if it did not require the same for the paper-based equivalent.

72. The importance of documenting any change to the information contained in the electronic transferable record was stressed.

73. After discussion, it was agreed that draft article 15 should be separated into two draft articles: one dealing with substantive information requirements and another dealing with the possibility of including in the electronic transferable record additional information that related to its electronic nature or was necessary due to technical reasons.

#### **Draft article 16. Possession**

#### **Draft article 17. Control**

74. With respect to draft article 16, the Working Group confirmed that there was no need to refer to “exclusive” control as the concept of control in itself implied exclusivity.

75. With respect to draft article 17, it was widely felt that the concept of control referred only to factual control and that a person who exercised control might not necessarily be the rightful holder, which was a matter of substantive law.

76. In that connection, a suggestion was made that draft articles 16 and 17 should aim at providing a rule for legitimate possession and that control should only be understood to mean legitimate control. It was further stated that a person in control should be the rightful holder and unless that result was achieved, the method employed for the use of electronic transferable records would not be considered reliable. In response, it was reiterated that whether control of an electronic transferable record was legitimate or not was a matter of substantive law and that the Working Group had understood control to be “factual”, so as to achieve the functional equivalence of “factual or physical” possession in a paper-based environment.

77. With regard to draft article 17, paragraph 1, differing views were expressed.

78. One view was that the first square bracketed text at the end of paragraph 1 (“the person which, directly or indirectly, has the de facto power over the electronic transferable record”) better reflected the understanding of the Working Group that control meant that the person in control had the de facto power to deal with or factually dispose of the electronic transferable record. It was further noted that the reference to “issuance” and “transfer” in the second square bracketed text (“the person to which the electronic transferable record was issued or transferred”) posed challenges as it would only apply when the issuance or transfer was legitimate but not when a person had obtained control without the consent of the previous holder. It was explained that the concept of de facto power would cover instances similar to a thief’s possession of a paper-based transferable document or instrument. It was also explained that the second square bracketed text caused a circularity problem as the notion of issuance and transfer relied, in turn, on the concept of control.

79. While there was general support for that view (see para. 78 above), another view was that the second square bracketed text would be preferable as it only dealt with the factual aspects of issuance and transfer of an electronic transferable record without any legal implication. Moreover, it was stated that the term “de facto power” in the first square bracketed text was an unknown legal concept.

80. In order to comprehensively address those concerns, a suggestion was made that draft article 16 and draft article 17, paragraph 1, should be merged and contain a reference to “de facto control of an electronic transferable record, which shall be established by a reliable method”. It was explained that the revised draft article would provide a functional equivalence rule for physical possession. It was further explained that such an approach would respect technological neutrality as the method for establishing control differed from one information system to another. For the same reason, it was said that there was no need to illustrate or define how control was to be established.

81. While there was support for that suggestion (see para. 80 above), a concern was raised that “de facto control” could be understood to have a different meaning from the general notion of “control”. Another concern was that the substance of draft article 17, paragraph 1, which aimed at describing control, was no longer available.

82. In response, it was noted that the general notion of “control” would not be affected by adding the words “de facto”. It was added that the addition of those words emphasized the factual aspect of control and that whether control was legitimate or not was a matter of substantive law. Accordingly, it was suggested to place the words “de facto” in square brackets, to include some explanation on what was meant by de facto control and to consider whether the factual aspect of control might possibly be included in the definition of “control”. Those suggestions received support.

83. After discussion, it was agreed that draft article 17, paragraph 1, should be deleted and that draft article 16 should be revised as follows: “Where the law requires the possession of a paper-based transferable document or instrument, or provides consequences for the absence of possession, that requirement is met through the [de facto] control of an electronic transferable record, which shall be established by a reliable method.” It was further clarified that the words “de facto” were put in square brackets to provide the Secretariat with some flexibility in preparing the revised draft article, for example, by introducing a different term, by including an explanation of the term “de facto”, or by adding a definition of the term “control” as being “de facto” in draft article 3.

84. As to the heading of the revised draft article 16, while a suggestion was made that it should refer to “possession and control”, it was widely felt that the current heading “possession” would be more appropriate and in line with other functional equivalence rules contained in the draft provisions.

85. Noting that the revised draft article 16 included a reference to “a reliable method”, differing views were expressed with respect to draft article 17, paragraph 2.

86. One view was that draft article 17, paragraph 2, should be understood as a safe harbour provision or as providing mere guidance by identifying an example of when a method would be considered to meet the reliability standard. Another view was that an illustrative list of factors that might be relevant to the reliability standard could be provided. It was explained that the level of reliability depended on the information system and that it was for the parties to choose the level of reliability adequate for their transactions. It was noted that such an approach had been taken in the Electronic Communications Convention (e.g., article 9, subparagraph 3(b)(i)). It was also mentioned that setting mandatory minimum requirements could have a negative impact on existing business practices, which differed significantly in the way they ensured reliability. Accordingly, one suggestion was to delete draft article 17, paragraph 2.

87. A view was expressed that draft article 17, paragraph 2 was not a safe harbour provision for the notion of “control”, but was in fact a safe harbour provision for the notion of the “holder being in control” of an electronic transferable record. Therefore, it was suggested that the paragraph should be placed elsewhere, if retained.

88. Another view was that the draft provisions should set forth, in technology-neutral terms, mandatory minimum requirements for any method to be considered reliable, similar to the approach taken in article 6, paragraph 3, of the Model Law on Electronic Signatures. It was stated that referring to a “reliable” method without specifying such requirements would be of little value as that notion would have no meaning and could actually cause more uncertainty. It was stressed that as the draft provisions contained several draft articles referring to “reliable”, the need arose to specify objective criteria for meeting that requirement in a general manner. It was said that such criteria would increase legal certainty, particularly for commercial operators involved in the use and management of the electronic transferable records. To that end, the following draft provision was suggested as a starting point for future discussion: “In determining reliability for the purposes of draft articles 11, 12 and 16, regard shall be had to the extent to which the method employed is able to ensure data integrity and to prevent unauthorised access to and use of the [system] [method]”. In response, it was said that parameters offering guidance on reliability should vary with each draft article where a reliable method was referred to, as each draft article required a reliable method for the purpose of establishing a different quality, and that draft article 17 should only focus on offering guidance with respect to the notion of control.

89. After discussion, it was agreed that draft provisions offering guidance on reliability should present for future discussion by the Working Group various approaches, namely, listing mandatory minimum requirements, presenting possible elements to be considered, and providing a safe harbour rule.

90. Yet another suggestion was that draft article 17, subparagraph 2(b) should be deleted as it dealt with the question of whether and to whom the electronic transferable record was issued or transferred, which were matters of substantive law. It was suggested that subparagraph 2(b) should be revised as follows: “The electronic transferable record identifies the person who, directly or indirectly, has de facto power over the record”.

#### **Draft article 18. Delivery**

91. A suggestion was made that draft article 18 should be deleted as no functional equivalence rule was necessary for the concept of delivery. In response, it was said that delivery was a common requirement in substantive law and therefore draft article 18 should be retained. It was suggested that the reference to draft article 21 was superfluous.

92. After discussion, the Working Group decided to retain draft article 18 and to delete the words “in accordance with draft article 21”.

**Draft article 19. Presentation**

93. A question was raised whether presentation entailed handing over of the paper-based transferable document to the obligor for performance, as that aspect had not been captured in draft article 19. It was said that, as the requirements for presentation were indeed different from those for delivery, a separate provision for presentation was necessary. A view was expressed that cases existed in which presentation could occur without delivery.

94. The Working Group decided to retain draft article 19 for future consideration.

**Draft article 20. Endorsement**

95. It was explained that while signature and writing were indeed elements of endorsement, those elements were shared with other concepts related to paper-based documents or instruments, for example, acceptance. It was recalled that in a paper-based environment, a peculiar feature of endorsement was its placement on the back of the document or instrument. It was suggested that draft article 20 should be redrafted to better reflect the functions of endorsement.

96. The view was expressed that, if both delivery and endorsement were required for transfer of a paper-based transferable document or instrument, transfer of control of an electronic transferable record in accordance with the draft provisions without meeting the endorsement requirement would result in the transferee being in control of the record, but not being the rightful holder.

97. Subject to those views, the Working Group decided to retain draft article 20 for future consideration.

**Draft article 21. Transfer of an electronic transferable record**

98. It was suggested that paragraph 1 was superfluous as it merely restated what was already expressed in the definition of “transfer”. In response, it was noted that draft article 21 was justified in light of the prominence of the notion of transfer in the paper-based environment.

99. It was indicated that paragraph 2 was unclear and that the underlying notion referring to the possibility of modifying the requirements for transfer of an electronic transferable record, when permitted by substantive law, was already implicit in draft article 1, paragraph 2. It was added that a clarification to that end could be included in the text accompanying draft article 1, paragraph 2, and that draft article 21, paragraph 2, could be deleted accordingly.

100. Subject to those views, the Working Group decided to retain draft article 21 for future consideration.

**Draft article 22. Amendment of an electronic transferable record**

101. With respect to draft article 22, it was suggested that: (a) it would be useful to clarify the difference between amendments and other events that added to the substance of an electronic transferable record, such as endorsements and transfer of control; (b) a distinction should be made between amendments which pertain to substantive information and inclusion of additional technical information as mentioned in draft article 15, paragraph 2; (c) a general statement should be provided that an electronic transferable record could be modified; (d) the use of the word “shall” in the draft article and in other draft articles should be revised, as it should not be interpreted as restricting party autonomy; and (e) draft article 22 should be restructured as a functional equivalence rule (see A/CN.9/WG.IV/WP.124/Add.1, para. 24).

**Draft article 23. Replacement**

102. With respect to draft article 23, it was suggested that: (a) paragraph 3 was not necessary since it reiterated a general rule of party autonomy and thus should be deleted or if retained, the words “or simultaneously” should be added after the words “any time prior”; (b) the word “present” might be replaced with the word “surrender” or some other term

taking into account their notions in the substantive law; and (c) further consideration should be given to the words “obligor” and “issuer”.

103. In that context, a question was asked if the words “all information contained” in draft article 23, subparagraph 2(b) referred to substantive information or also to information specific to the electronic medium, such as information about the date and time of transfer of control, which might only be required in the electronic medium.

#### **Draft article 24. Reissuance in the original medium**

104. With respect to draft article 24, it was suggested that: (a) it should be closely examined in relation to draft article 23 to avoid any contradiction and the two draft articles could be combined; (b) additional rules on the preservation of paper-based transferable documents or instruments upon replacement to electronic transferable records might be provided (see also A/CN.9/WG.IV/WP.124/Add.1, para. 43); (c) it might be expanded to include a separate rule for reissuance due to other reasons, for example, loss or damage; (d) how replacement of an electronic transferable record with a paper-based transferable document or instrument (dealt in draft article 23) and the reissuance of a paper-based transferable document or instrument (dealt in draft article 24) would interact with the substantive law should be examined; (e) draft article 24 should focus on providing a rule for cases in which a problem arose in the replacement process, since that would probably not be dealt with in the substantive law; and (f) the actual practice of replacement should be considered.

#### **Draft article 25. Division and consolidation of an electronic transferable record**

105. With respect to draft article 25, it was suggested that: (a) square bracketed version of paragraph 1 was preferable so as to respect party autonomy; and (b) draft article 25 should be considered in conjunction with draft articles 12, 22 and 23.

106. It was also suggested that draft articles 25, 26 and 27 should be formulated into a functional equivalence rule with the chapeau revised along the following lines: “where any rule of law governing a paper-based transferable document or instrument permits ...”.

#### **Draft article 29. Conduct of a third-party service provider**

##### **Draft article 30. Trustworthiness**

107. It was suggested that draft article 29 and 30 ought to be placed in an explanatory note as they were regulatory in nature. It was further said that parties should have the autonomy to choose whether or not to use a third-party service provider as well as the level of trustworthiness of the services. It was also suggested that the term “relying party” in draft article 29 would need to be clarified.

#### **Draft article 31. Non-discrimination of foreign electronic transferable records**

108. With respect to draft article 31, it was said the paragraphs 1 and 2 should be redrafted to avoid any contradictions, particularly in light of the rule under which the law of the jurisdiction where the paper-based transferable document or instrument was issued applied to matters of validity of that document or instrument.

#### **Relationship with the Geneva Conventions**

109. The Working Group considered the Geneva Conventions in relation to the draft provisions based on document A/CN.9/WG.IV/WP.125 (see para. 20 above).

110. With respect to the possibility of adopting a flexible interpretation of the Geneva Conventions (see A/CN.9/WG.IV/WP.125, para. 24), it was noted that the Geneva Conventions were to be strictly interpreted to permit only paper-based instruments. It was indicated that formalism was a fundamental principle underpinning the Geneva Conventions and that functional equivalence might not suffice to satisfy that principle. It was explained that, for that reason, one jurisdiction had introduced electronic equivalents of the paper-based instruments falling under the scope of the Geneva Conventions as distinct legal notions under a separate substantive law (see A/CN.9/WG.IV/WP.125, para. 23).



111. With respect to the possibility of adopting a protocol to the Electronic Communications Convention (see A/CN.9/WG.IV/WP.125, para. 28), which would remove the current exclusion of electronic transferable records from the scope of application of the Electronic Communications Convention and enable its interaction with the Geneva Conventions in a manner akin to that already envisaged in article 20 of the Electronic Communications Convention, it was stated that that was not a feasible option. It was noted that the Geneva Conventions contained provisions on their amendment that could not be circumvented. It was added that a protocol amending the Geneva Conventions would need to be adopted by all States parties to those Conventions, which was unlikely.

112. It was further indicated that, if the outcome of the current work of the Working Group would be in the form of a model law, it would be possible for enacting States that are parties to the Geneva Conventions to exclude instruments dealt with in the Geneva Conventions from the scope of application in their national law, thus preventing potential conflicts.

#### **Other remarks**

113. During the session, it was stated that party autonomy was a key element in the maritime industry as the various parties involved (shippers, carriers, banks, governments, etc.) applied different standards or requirements for the use of transport documents. It was further stated that the critical aspect in using transport documents was ensuring the singularity of performance so that only one holder would be entitled to performance of obligation. It was reiterated that achieving uniqueness in an electronic environment would be quite difficult as the information system would typically generate multiple records stored in various locations, for instance, to ensure business continuity. With respect to multiple originals, it was noted that there might be various methods in an electronic environment to achieve the functions performed through multiple originals in a paper-based environment.

114. The Working Group heard a presentation by the Korean Financial Telecommunications and Clearings Institute on the management of electronic promissory notes in the Republic of Korea. The legal framework and business procedures for electronic promissory notes were illustrated in light of the draft provisions. In addition, some suggestions were made with respect to the practical aspects of operating an electronic transferable record management system.

## **V. Technical assistance and coordination**

115. The Working Group heard an oral report on the technical assistance and coordination activities undertaken by the Secretariat, including the promotion of UNCITRAL texts on electronic commerce.

116. The Working Group heard also a report on the progress of the preparation of a draft regional arrangement for the facilitation of cross-border paperless trade promoted by the United Nations Economic and Social Commission for Asia and the Pacific (UN/ESCAP) in the framework of the implementation of UN/ESCAP resolution 68/3. The use of UNCITRAL texts for building an enabling legal environment for paperless trade in that draft arrangement was highlighted.

117. The Working Group also took note of the coordination activity with the United Nations Centre for Trade Facilitation and E-business (UN/CEFACT) on the revision of UN/CEFACT recommendation 14 (Authentication of trade documents) and work related to single windows interoperability.

118. The Working Group was further informed of recent developments relating to the use of electronic communications in the Russian Federation with a view to facilitating cross-border recognition at the international and regional levels. In particular, reference was made to the Asia-Pacific Economic Cooperation (APEC) Project "Interoperable ICT: Semantic, linguistic and their aspects", which analysed linguistic, semantic and other aspects of interoperability including the trusted cross-border exchange of electronic documents in order to facilitate interaction of automated systems for economic integration in the APEC region. The Working Group was also informed that the domestic procedures for the

ratification of the Electronic Communications Convention by the Russian Federation had been completed.

119. The Working Group was informed of progress made by the Paperless Trading Subgroup of the APEC Electronic Commerce Steering Group, particularly with respect to the e-b/L exchange project involving China, the Republic of Korea and the Russian Federation.

120. The Working Group also heard a presentation by a representative of the European Commission on the proposed Regulation on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market (e-IDAS), which dealt with mutual recognition of electronic identification and electronic trust services (e-signature, e-seals, time stamping, e-delivery, e-document and website authentication) in the European Union. It was said that certain aspects of the proposed Regulation could shed light on the issues that the Working Group was seeking to address with respect to electronic transferable records.

121. The Working Group expressed its appreciation to the Secretariat for the information provided on technical assistance and coordination activities. The Secretariat was requested to continue working closely with relevant organizations to monitor activities relating to the preparation and promotion of legal texts on electronic commerce with a view to ensuring coordination between the various initiatives and to continue reporting on those activities to the Working Group. States were also asked to provide relevant information to the Secretariat.

## **VI. Other business**

122. The Working Group was informed that the forty-ninth session was scheduled to take place in New York from 28 April to 2 May 2014.

**B. Note by the Secretariat on draft provisions on electronic transferable records  
(A/CN.9/WG.IV/WP.124 and Add.1)**

**[Original: English]**

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**I. Introduction**

1. At its forty-fourth session, in 2011, the Commission mandated the Working Group to undertake work in the field of electronic transferable records.<sup>1</sup>
2. At its forty-sixth session (Vienna, 29 October-2 November 2012), broad support was expressed by the Working Group for the preparation of draft provisions on electronic transferable records, to be presented in the form of a model law without prejudice to the decision on the form of its work to be made by the Working Group (A/CN.9/761, paras. 90-93).
3. At its forty-seventh session (New York, 13-17 May 2013), the Working Group began reviewing the draft provisions on electronic transferable records as provided in document A/CN.9/WG.IV/WP.122 and noted that while it was premature to start a discussion on the final form of work, the draft provisions were largely compatible with different outcomes that could be achieved. Part II of this note contains the draft provisions reflecting the deliberations and decisions of the Working Group during that session (A/CN.9/768, paras. 13-111).
4. At that session, it was indicated that rules enabling the use of electronic transferable records would interact with general provisions on the use of electronic transactions, and that further harmonization of those general provisions, in particular through broader adoption of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (the “Electronic Communications Convention”), was highly desirable (A/CN.9/768, para. 15).

**II. Draft provisions on electronic transferable records**

**A. General**

*“Draft article 1. Scope of application*

- “1. This Law applies to electronic transferable records.
- “2. Nothing in this Law affects the application of any rule of law governing a [corresponding] paper-based transferable document or instrument to an electronic transferable record other than as provided for in this Law.
- “[3. This Law applies to electronic transferable records other than as provided by [law governing a certain type of electronic transferable record to be specified by the enacting State].]”

<sup>1</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17), para. 238.*

**Remarks**

5. Paragraph 1 of draft article 1 reflects the Working Group's understanding that generic rules based on a functional approach should be developed encompassing various types of electronic transferable records (A/CN.9/761, para. 18).

6. Paragraph 2 of draft article 1 states that the draft provisions should not deal with and does not affect matters governed by any rule of law governing a paper-based transferable document or instrument (hereinafter referred generally to as "substantive law") (A/CN.9/761, paras. 20, 28, 49, 62, 68, 71, 79 and 85 and A/CN.9/768, para. 14). The Working Group may wish to consider including words such as "corresponding" in paragraph 2 of draft article 1 to clarify that the substantive law governing, for example, bills of lading would apply to electronic bills of lading and not electronic promissory notes.

7. While the main objectives of the draft provisions are to transpose what exists in a paper-based environment into an electronic environment and to achieve functional equivalence (A/CN.9/768, para. 18), the draft provisions may also provide guidance to States (and in certain cases, relevant industries) that are preparing rules on instruments that would exist only in an electronic environment (for example, Electronically Recorded Monetary Claims Act of Japan). The draft provisions could ensure the consistency of rules applicable to all instruments that exist in the electronic environment, regardless of whether a corresponding paper-based document or instrument exists or not. Yet, as the draft provisions do not intend to deal with matters of substantive law (A/CN.9/768, para. 32), States enacting legislation on instruments that exist only in an electronic environment would need to prepare more comprehensive legislation for such instruments and deal with the interaction between that legislation and the draft provisions. Paragraph 3 provides an alternative approach for such States. The Working Group may wish to proceed with this understanding rather than debating whether instruments that exist only in the electronic environment should be included in the scope of the draft provisions.

8. Questions raised with respect to the compatibility of the draft provisions with the provisions of the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 7 June 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 19 March 1931) are dealt with in document A/CN.9/WG.IV/WP.125.

***"Draft article 2. Exclusion***

"[1. This Law does not override any rule of law applicable to consumer protection.]

"2. This Law does not apply to securities, such as shares and bonds, and other financial instruments including financial derivatives."

**Remarks**

9. Paragraph 1 of draft article 2 mirrors article 1 of the UNCITRAL Model Law on Electronic Signatures (2001) and recognizes that consumer protection law shall, in case of conflict, take precedence over the draft provisions. The Working Group may wish to consider whether there is any merit in retaining this paragraph.

10. Paragraph 2 of draft article 2 reflects the discussion by the Working Group on the scope of exclusion (A/CN.9/768, para. 23). The Working Group may wish to consider whether it might be more appropriate to address this issue in the definition of "electronic transferable record" (see para. 15 below). "Financial instruments" should not be understood to refer generally to electronic transferable records that might have financial consequences and the Working Group may wish to qualify the meaning of that term.

11. The Working Group may wish to further discuss its scope of work, possibly specifying transactions (for example, foreign exchange transactions) that should be excluded from the scope of the draft provisions, possibly along the lines of article 2, paragraph 1, subparagraph (b), of the Electronic Communications Convention.

***"Draft article 3. Definitions***

"For the purposes of this Law:

**Remarks**

12. The definitions in draft article 3 have been prepared as a reference and should be examined in the context of the relevant draft articles. The terms are presented in the order they appear throughout the draft provisions (A/CN.9/768, para. 34). Remarks for consideration by the Working Group have been placed after each definition.

13. In addition to the remarks below, the Working Group may wish to consider whether (i) to include a definition of “control” by referring to the procedure set out in draft article 17 and (ii) to clarify in draft article 3 that a person may either be a natural or a legal person.

*“electronic transferable record”* means a record used in an electronic environment that is capable of transferring the right to performance of obligation incorporated in the record through the transfer of that record.

**Remarks**

14. The Working Group may wish to consider whether the drafting correctly reflects the Working Group’s conclusion that the definition should be broadened by focusing on the key function of transferability and without making reference to paper-based transferable documents or instruments (A/CN.9/768, paras. 27-31). The Working Group may wish to consider the following drafting suggestion: “a record issued in an electronic environment that can be used to transfer the right to the performance of obligation specified in the record through the transfer of that record.” The word “specified” is suggested for consistency with the definition of a “paper-based transferable document or instrument”.

15. As mentioned (see para. 10 above), the Working Group may also wish to include a further explanation to the definition of “electronic transferable record” along the following lines and delete paragraph 2 of draft article 2: “An electronic transferable record does not include securities, such as shares and bonds, and other financial instruments including financial derivatives.”

*“paper-based transferable document or instrument”* means a transferable document or instrument issued on paper that entitles the bearer or beneficiary to claim the performance of obligation specified in the paper-based transferable document or instrument.

*“electronic record”* means information generated, communicated, received or stored by electronic means.

**Remarks**

16. In considering draft articles 8 and 9, the Working Group may wish to consider including a definition of “data message” as mentioned in the UNCITRAL Model Law on Electronic Commerce and the Electronic Communications Convention or introducing a new term “electronic record” as defined above. In doing so, the Working Group may also wish to consider the definition of “electronic transport record” in the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the “Rotterdam Rules”). If the term “electronic record” is introduced, this could also replace the phrase “a record used in an electronic environment” in the definition of an “electronic transferable record” (see para. 14 above).

*“issuance”* of an electronic transferable record means the issuance of the record in accordance with the procedure set out in draft articles 14 and 17.

*“issuer”* means a person that issues an electronic transferable record on its own behalf.

**Remarks**

17. The Working Group may wish to consider whether (i) to retain the definition of “issuer” and (ii) to include a further explanation along the following lines: “When an electronic transferable record is issued by a third-party service provider upon the issuer’s request, the third-party service provider is not considered an issuer under this Law.”

*“holder”* of an electronic transferable record is a person in control of the electronic transferable record in accordance with the procedure set out in draft article 17.

**Remarks**

18. The Working Group may wish to consider whether the definition of accurately reflects the Working Group's conclusion (A/CN.9/768, para. 86) and clarifies that a holder of an electronic transferable record would only have de facto control of the electronic transferable record. Whether the holder is the rightful holder and the substantive rights of the holder are matters for the substantive law and the draft provisions would not endow the holder with such rights (A/CN.9/WG.IV/WP.122, paras. 29 and 31).

19. Should the Working Group wish to avoid any reference to notion of "control", "holder" may be defined as "a person to which an electronic transferable record has been issued or transferred" or "a person who has been issued an electronic transferable record or a transferee of an electronic transferable record."

"*transfer*" of an electronic transferable record means the transfer of control over an electronic transferable record.

**Remarks**

20. The Working Group may wish to consider whether to retain this definition.

"*amendment*" means the modification of information contained in the electronic transferable record in accordance with the procedure set out in draft article 22.

"*performance of obligation*" means the delivery of goods or the payment of a sum of money as specified in a paper-based transferable document or instrument or an electronic transferable record.

**Remarks**

21. The Working Group may wish to consider whether there is merit in retaining this definition which refers generally to the delivery of goods or the payment of a sum of money as mentioned in article 2, paragraph 2, of the Electronic Communications Convention (A/CN.9/761, para. 22).

"*obligor*" means the person specified in a paper-based transferable document or instrument or an electronic transferable record who has the obligation to perform.

**Remarks**

22. The Working Group may wish to consider whether to further clarify in the definition that the substantive law would address who the obligor is.

"*replacement*" means the change in the medium, either from a paper-based transferable document or instrument to an electronic transferable record or vice versa.

**Remarks**

23. The Working Group may wish to consider whether the definition should be limited to instances where there is change only in the medium in accordance with the procedure set out in draft article 23 or whether it should be broadened to include instances where an electronic transferable record was issued to substitute another electronic transferable record (see A/CN.9/WG.IV/WP.124/Add.1, para. 27).

"*third-party service provider*" means a third party providing services related to the use of electronic transferable records in accordance with draft articles 29 and 30."

**"Draft article 4. Interpretation**

"1. This Law is derived from [...] of international origin. In the interpretation of this Law, regard is to be had to the international origin and to the need to promote uniformity in its application and the observance of good faith.

"2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based."

**Remarks**

24. Draft article 4 is intended to draw the attention of courts and other authorities to the fact that the draft provisions, while enacted as part of domestic law, should be interpreted with reference to their international origin in order to facilitate uniform interpretation in various countries (A/CN.9/768, para. 35). “General principles” mentioned in paragraph 2 of draft article 4 refers to the general principles of electronic transactions.

25. Inspired by article 7 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), most UNCITRAL texts, including the UNCITRAL Model Law on Electronic Commerce (article 3) as well as the Electronic Communications Convention (article 5), contain such a provision. A more recent formulation in a model law can be found in article 2A of the UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006). The Working Group may wish to reconsider draft article 4 once it had made a decision on the final form of its work.

***“Draft article 5. Party autonomy***

“1. [Draft articles \*\*, \*\* and \*\* may be derogated from or their effect may be varied by agreement.][Except as otherwise provided, the parties may not derogate from or vary by agreement the provisions of this Law.]

“2. Such an agreement does not affect the rights of any person that is not a party to that agreement.”

**Remarks**

26. The Working Group indicated that, while the principle of party autonomy is a cornerstone of UNCITRAL texts, its operation in connection to the use of electronic transferable records would generally be limited due to the constraints in substantive law. It was also indicated that the interest of third parties should not be affected (A/CN.9/768, para. 36). The Working Group may wish to review the draft provisions and in the case that it finds that there are no draft articles from which the parties may derogate, it may wish to delete draft article 5 entirely or reformulate it.

***“Draft article 6. Information requirements***

“Nothing in this Law affects the application of any rule of law that may require a person to disclose its identity, place of business or other information, or relieves a person from the legal consequences of making inaccurate, incomplete or false statements in that regard.”

**Remarks**

27. Draft article 6 mirrors article 7 of the Electronic Communications Convention which reminds parties of the need to comply with possible disclosure obligations that might exist under other law (Explanatory note on the Electronic Communications Convention, paras. 122-128). Draft article 6 should not be interpreted as prohibiting the issuance of an electronic transferable record to bearer, which is separately dealt with in draft article 14, paragraph 2 (A/CN.9/768, para. 39).

**B. Provisions on electronic transactions**

28. The Working Group agreed that the following articles 7 to 10 which reproduced some of the general rules governing electronic transactions should form a separate section (A/CN.9/768, paras. 40 and 44). As noted (para. 4 above), the draft provisions would interact with general rules governing electronic transactions.

29. The Working Group may wish to consider whether to keep these draft articles in a separate section or to combine them with the previous section. The Working Group may also wish to consider whether rules on time and place of dispatch and receipt of electronic communication along the lines of article 10 of the Electronic Communications Convention should be included in this section.

***“Draft article 7. Legal recognition of an electronic transferable record***

“An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form.”

**Remarks**

30. Draft article 7 states the principle of non-discrimination and is formulated on the basis of existing UNCITRAL provisions that have received numerous enactments (A/CN.9/768, para. 39).

***“Draft article 8. Writing***

“Where the law requires that [a communication] [information] should be in writing or provides consequences for the absence of a writing, that requirement is met with respect to the use of an electronic transferable record by [an electronic communication] [an electronic record] if the information contained therein is accessible so as to be usable for subsequent reference.”

***“Draft article 9. Signature***

“Where the law requires [that a communication should be signed by a person] [a signature of a person] or provides consequences for the absence of a signature, that requirement is met with respect to the use of an electronic transferable record if:

(a) A method is used to identify that person and to indicate that person’s intention in respect of the information contained in [the communication][an electronic record]; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which [the communication] [an electronic record] was generated, in the light of all the relevant circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.”

**Remarks**

31. Based on articles 6 and 7 of the UNCITRAL Model Law on Electronic Commerce and article 9 of the Electronic Communications Convention (paragraphs 2 and 3), draft articles 8 and 9 establish minimum standards on form requirements that may exist under the substantive law.

32. While the Working Group had agreed that the word “communication” should be used in draft article 8 (A/CN.9/768, para. 44), the word “information” may be more appropriate as it is broader in scope and may cover instances whereby information may not necessarily be communicated.

33. If the Working Group wishes to proceed with this understanding, the latter part of the draft article would need to be revised to refer to an electronic record instead of an electronic communication (see draft article 3 and para. 16 above). Similar changes will be necessary for draft article 9.

34. The Working Group may also wish to consider incorporating the two-tier approach in the UNCITRAL Model Law on Electronic Signatures, which sets out the objective criteria of reliability of electronic signatures. This could create more certainty by recognizing certain techniques as being particularly reliable, irrespective of the circumstances in which they are used. Article 6, paragraph 3, states that an electronic signature is considered to be reliable for the purposes of satisfying the requirement in paragraph 1 if: (a) the signature creation data are, within the context in which they are used, linked to the signatory and to no other person; (b) the signature creation data were, at the time of signing, under the control of the signatory and of no other person; (c) any alteration to the electronic signature, made after the time for signing, is detectable; and (d) where a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.



***“Draft article 10. Original***

“1. Where the law requires [information to be presented/available or retained in its original form] [an original], or provides consequences for the absence of an original, that requirement is met with respect to the use of an electronic transferable record if:

- (a) ... ; and
- (b) ...”

**Remarks**

35. Draft article 10 establishes a minimum standard on form requirement of an original. The Working Group noted that article 8 of the UNCITRAL Model Law on Electronic Commerce and article 9, paragraph 4, of the Electronic Communications Convention, which formed the basis of draft article 10, were drafted to address matters such as originality of contracts, and that the life cycle of an electronic transferable record deserved a different approach (A/CN.9/768, para. 48). The Working Group also noted that the functional equivalent of the paper-based notion of original was of limited practical use with respect to the use of electronic transferable records since all related legal needs could be satisfied by establishing the functional equivalents of the paper-based notions of authenticity, uniqueness, and integrity, which were addressed respectively in draft articles 9, 11 and 12 (A/CN.9/768, paras. 49 and 50). The Working Group may wish to consider how the original form requirement, if any, would be met after considering the relevant draft articles (A/CN.9/768, para. 50), upon which it may decide to remove the draft article entirely.

**C. Use of electronic transferable records*****“Draft article 11. Uniqueness of an electronic transferable record***

“1. A reliable method shall be employed to render an electronic transferable record unique.

“2. A method satisfies paragraph 1, if it:

- (a) Designates an authoritative copy of an electronic transferable record, which is readily identifiable as such; and
- (b) Ensures that the authoritative copy of an electronic transferable record cannot be reproduced.”

**Remarks**

36. Draft article 11 reflects the understanding of the Working Group that uniqueness should aim at entitling only one holder of the electronic transferable record to performance of obligation and preventing circulation of multiple records relating to the same performance obligation (A/CN.9/761, paras. 33-37 and A/CN.9/768, paras. 51 and 76). It was prepared with the understanding that uniqueness, like integrity of an electronic transferable record, is a quality that should be assured throughout the life cycle of the electronic transferable record (see para. 37 below).

***“Draft article 12. Integrity of an electronic transferable record***

“1. A reliable method shall be employed to provide assurance that an electronic transferable record retains its integrity from its issuance.

“2. For the purposes of paragraph 1:

- (a) The criteria for assessing integrity shall be whether the information contained in the electronic transferable record has remained complete and unaltered, apart from the addition of any change that arises throughout the life cycle of the electronic transferable record; and
- (b) The standard of reliability required shall be assessed in the light of the purpose for which the information contained in the electronic transferable record was generated and in the light of all the relevant circumstances.”

**Remarks**

37. The Working Group noted that integrity of an electronic transferable record was a quality not necessarily linked with the paper-based notion of “original” and one that should be assured throughout the life cycle of the electronic transferable record (A/CN.9/768, para. 55). It was further agreed that draft articles 10 and 12 should be retained separately (A/CN.9/768, para. 56).

38. Accordingly, draft articles 11 and 12 have been placed at the very beginning of the section on the use of electronic transferable records. The Working Group may wish to consider whether the placement of these draft articles is appropriate or whether they should follow draft article 14 on issuance.

39. Changes of purely technical nature, for instance, modifications due to data migration, would not affect the integrity of an electronic transferable record and thus should fall under the “addition of any change” referred to in paragraph 2, subparagraph (a), of draft article 12 (A/CN.9/768, para. 54) (see also A/CN.9/WP.IV/WP.124/Add.1 paras. 22-24).

***“Draft article 13. Consent to use an electronic transferable record***

“1. Nothing in this Law requires a person to use an electronic transferable record [without its consent].

“2. The use of an electronic transferable record requires the consent of the parties.

“3. The consent of a person to use an electronic transferable record may be inferred from the person’s conduct.”

**Remarks**

40. Draft article 13 is based on article 8, paragraph 2, of the Electronic Communications Convention. Paragraph 1 of draft article 13 states the general principle that a person would not be obliged to use an electronic transferable record.

41. Paragraph 2 of draft article 13 addresses the requirement that parties involved in the use of electronic transferable records would need to consent to their use. Paragraph 2 also reflects the suggestion that the paragraph should be formulated as a general requirement without making any reference to individual draft articles (for example, draft articles 14, 21, 22, 23 and 25) (A/CN.9/768, paras. 57 and 58). It should, however, be noted that draft article 23 on replacement would require not only the consent of the parties to use an electronic transferable record but also their consent to the replacement.

42. The word “parties” in paragraph 2 is used in a generic manner to encompass all those involved in the use of electronic transferable records, for example, the issuer, the first holder, the transferee, the obligor, the grantor or the secured creditor (A/CN.9/768, para. 57).

43. With respect to paragraph 2 of draft article 13, the Working Group may wish to consider whether adding the words “without its consent” in paragraph 1 would suffice and whether individual draft articles should respectively contain consent requirements.

44. Paragraph 3 of draft article 13 deals with instances where the consent of the party would be implied, for example, when the transferee of the electronic transferable record obtained control of that record (A/CN.9/768, para. 57).

***“Draft article 14. Issuance of an electronic transferable record***

“1. The issuance of an electronic transferable record shall require the consent of the issuer and the first holder to use an electronic medium.

“2. Nothing in this Law precludes the issuance of an electronic transferable record to bearer. [Nothing in this Law requires the identity of the holder to be disclosed.]

“3. Upon issuance, an electronic transferable record shall be subject to control until it ceases to have any effect or validity.

“4. Where any rule of law governing a [corresponding] paper-based transferable document or instrument permits the issuance of more than one original of a paper-

based transferable document or instrument and more than one original is issued, this may be achieved with respect to the use of electronic transferable records by ....”

### Remarks

45. Paragraph 1 of draft article 14 states that parties involved in the issuance of an electronic transferable record (the issuer and the first holder) would need to agree to use an electronic medium (A/CN.9/761, para. 32). The Working Group may wish to consider whether to retain paragraph 1 or to delete it, as draft article 13, paragraph 2, would state a general requirement for consent (see paras. 41-43 above). The Working Group may also wish to consider how this paragraph will operate when an electronic transferable record is issued to bearer.

46. The question of who the first holder is would be a matter of substantive law. For example, article 35 of the Rotterdam Rules allows the issuance of an electronic transport record to the shipper or the documentary shipper, if the shipper consents and in such circumstances, the party whose consent is required under paragraph 1 of draft article 14 would be the person to whom the electronic transport record is to be issued (the shipper or the documentary shipper, as the case might be) (A/CN.9/768, para. 60).

47. Paragraph 2 of draft article 14 reflects the discussion of the Working Group that the draft provisions should enable the use of electronic transferable records issued to bearer (A/CN.9/761, para. 26) and clarifies that an electronic transferable record may be issued to bearer in circumstances where the same would be allowed under the substantive law (A/CN.9/768, para. 67). The Working Group may wish to consider a more general formulation as provided in square brackets.

48. Paragraph 3 of draft article 14 is a general statement that an electronic transferable record should be subject to control from the time it is issued until when it ceases to have any effect or validity (A/CN.9/768, para. 70). The Working Group may wish to consider whether the paragraph is better placed in draft article 17 on control.

49. Paragraph 4 of draft article 14 deals with circumstances where the substantive law permits the issuance of multiple originals and there exists such business practice. It is rare that the issuance of multiple originals is required and thus, the Working Group felt that there was no need to achieve the functional equivalence for such requirement (A/CN.9/768, para. 71). The Working Group may wish to first discuss whether there would be a need to issue multiple originals in an electronic environment. Multiple originals had been issued in a paper-based environment to achieve various functions (to prepare for loss, to endow holders different authorities, to expedite transactions and so on), which may be achieved quite differently in an electronic environment (A/CN.9/768, para. 72). For example, when a paper-based transferable document or instrument issued in multiple originals is to be replaced with an electronic transferable record, all holders of the paper-based originals may establish control over the electronic transferable record (A/CN.9/768, para. 73) or the holders may be given limited access to the electronic transferable record (for example, one holder would be able to “amend” the record using one password and another holder would be able to “transfer control” using another password).

50. The Working Group may wish to consider whether to retain paragraph 4 with this understanding or delete paragraph 4 leaving the “multiple original” situation to the parties or the relevant electronic transferable record management system.

#### ***“Draft article 15. Additional information in an electronic transferable record***

“1. Nothing in this Law requires additional information for the issuance of an electronic transferable record beyond that required for the issuance of [a paper-based transferable document or instrument performing the same functions] [a corresponding paper-based transferable document or instrument].

“2. Nothing in this Law precludes the inclusion of information in an electronic transferable record in addition to that contained in [a paper-based transferable document or instrument performing the same functions] [a corresponding paper-based transferable document or instrument].”

**Remarks**

51. Paragraph 1 of draft article 15 reflects the understanding of the Working Group that information required for the issuance of an electronic transferable record should generally be the same as that required for the issuance of a paper-based transferable document or instrument with corresponding functions, as requiring additional information could lead to discrimination against the use of electronic means (A/CN.9/768, paras. 62-64).

52. As noted in draft article 1 (see para. 6 above), the Working Group may wish to consider using the words “a corresponding paper-based transferable document or instrument” in draft article 15 to refer to a paper-based transferable document or instrument, the functions of which an electronic transferable record aims to perform.

53. Paragraph 2 of draft article 15 reflects the understanding of the Working Group that throughout its life cycle, an electronic transferable record may contain information (for example, the consent of the parties, information to uniquely identify the electronic transferable record) in addition to that contained in a corresponding paper-based transferable document or instrument (A/CN.9/768, para. 66).

54. The Working Group may wish to note that paragraph 1 of draft article 15 deals with substantive information requirements (which should not be more burdensome for electronic transferable records), while paragraph 2 deals with information that may be included exclusively due to the dynamic nature of “electronic” transferable records.

## (A/CN.9/WG.IV/WP.124/Add.1) (Original: English)

## Note by the Secretariat on draft provisions on electronic transferable records

## ADDENDUM

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**II. Draft provisions on electronic transferable records (*continued*)****C. Use of electronic transferable records (*continued*)*****“Draft article 16. Possession***

“Where the law requires the possession of a paper-based transferable document or instrument or provides consequences for the absence of possession, that requirement is met through the control of an electronic transferable record in accordance with the procedure set out in draft article 17.”

**Remarks**

1. Draft article 16 reflects the understanding of the Working Group that the functional equivalence of possession with respect to the use of electronic transferable records is achieved through the notion of “control” (A/CN.9/761, paras. 24-25 and A/CN.9/768, paras. 45, 77 and 85). While the Rotterdam Rules use the phrase “exclusive control” of an electronic transport record, the word “control” has been used in draft article 16 and throughout the draft provisions as the concept in itself implies exclusivity. The Working Group may wish to confirm this understanding.
2. It should also be noted that the concepts of “right of control” and “controlling party” used in the Rotterdam Rules should be distinguished from the term “control”, as those terms relate to the substantive rights of the holder of an electronic transport record (A/CN.9/768, para. 83, and A/CN.9/WG.IV/WP.122, para. 30).

***“Draft article 17. Control***

“1. A person has control of an electronic transferable record if a method employed for the [use] [management] of electronic transferable records reliably establishes that person as [the person which, directly or indirectly, has the de facto power over the electronic transferable record] [the person to which the electronic transferable record was issued or transferred].

“2. A method satisfies paragraph 1, and a person is deemed to have control of an electronic transferable record, if the electronic transferable record is issued and transferred in such a manner that:

    [(a) the uniqueness and integrity of the electronic transferable record are preserved in accordance with draft articles 11 and 12;

    (b) the electronic transferable record identifies the person asserting control as:  
    (i) the person to which the record was issued or (ii) the person to which record was most recently transferred; and

    (c) the electronic transferable record is maintained by the person asserting control].”

**Remarks**

3. Draft article 17 is based on the discussion of the Working Group on the notion of “control” (A/CN.9/768, paras. 77-85).
4. To illustrate the notion of control, paragraph 1 of draft article 17 states that: (a) a method employed for the use or management of electronic transferable records should be set up, which would, among others, evidence the transfer of interests as a legal consequence of the issuance or transfer of the electronic transferable record; and (b) the method should establish the person which, directly or indirectly, has the de facto power over the electronic transferable record (A/CN.9/768, para. 81). De facto power is understood to mean, among others, the power to deal with or factually dispose of the electronic transferable record but should not be understood as being the technical ability of a third-party service provider to manage the information contained in an electronic transferable record (A/CN.9/768, para. 77).
5. Whether the person with control is a rightful holder and the substantive rights conferred to that person would be determined by substantive law (A/CN.9/768, para. 77). Therefore, a person in control of an electronic transferable record might be able to dispose of the electronic transferable record, even if it might not be the rightful holder (A/CN.9/768, para. 78). In this context, the Working Group may wish to consider the treatment of persons who were not authorized to assert control.
6. As the notion of de facto power might not necessarily be clear, another way of drafting the latter part of paragraph 1 would be to state that the person with control is “the person to which the electronic transferable record was issued or transferred”. While the validity of issuance and transfer of an electronic transferable record would be determined by substantive law, such drafting would cover the two instances where a person will be able to establish control over an electronic transferable record (A/CN.9/768, para 79). However, under such an approach, an unauthorized person (for example, one who had stolen the password required to access the electronic transferable record) would not be considered as having control of the electronic transferable record as it was never issued or transferred to that person. Nonetheless, that person, just like someone who had stolen a paper-based cheque, would be in a position to deal with or dispose of the electronic transferable record. In any case, if the Working Group wishes to formulate the paragraph in this manner, it may also wish to reconsider the definition of “holder” in draft article 3, as it would result in a circular definition.
7. Identifying a person asserting control as mentioned in paragraph 2, subparagraph (b), would not necessarily mean disclosing the identity (name) of that person, as an electronic transferable record may be issued or transferred to bearer and the method employed may provide for anonymity.
8. Mindful of the principle of technological neutrality, paragraph 2 aims at providing some guidance on when and how a method would meet the reliability standard in paragraph 1. The Working Group noted that the level of reliability would vary depending on the system or types of records and that it was for the parties to choose the level of reliability adequate for their transactions (A/CN.9/768, para. 82).
9. The Working Group may wish to combine draft articles 16 and 17 (A/CN.9/768, para. 84) upon considering the content of draft article 17.

***“Draft article 18. Delivery***

“Where the law requires the delivery of a paper-based transferable document or instrument or provides consequences for the absence of delivery, that requirement is met with respect to the use of an electronic transferable record through the transfer of control of an electronic transferable record in accordance with draft article 21.”

***“Draft article 19. Presentation***

“Where the law requires the presentation of a paper-based transferable document or instrument or provides consequences for the absence of presentation, that requirement is met with respect to the use of an electronic transferable record by demonstrating

that the person has control of the electronic transferable record in accordance with draft article 17.”

**“Draft article 20. Endorsement**

“Where the law requires the endorsement of a paper-based transferable document or instrument or provides consequences for the absence of endorsement, that requirement is met with respect to the use of an electronic transferable record when the requirements in draft articles 8 and 9 are met.”

**Remarks**

10. Draft article 18 reflects the understanding of the Working Group that delivery requirements are met through the transfer of control (A/CN.9/761, para. 50, and A/CN.9/768, para. 45).

11. It was pointed out that presentation including presentation for performance in an electronic environment introduced significant practical challenges due to remoteness and possible lack of familiarity between the parties (A/CN.9/761, paras. 70-71). The Working Group may wish to consider whether draft article 19 should be retained as a rule for achieving the functional equivalence of presentation, separate from those on possession and delivery, or simply be deleted as draft article 18 on delivery was sufficient (A/CN.9/768, para. 102 (c)).

12. It should be noted that draft article 19 on presentation was prepared to also cover requirements under substantive laws to “surrender” a paper-based transferable document or instrument for its performance (for example, article 47, para. 1, subpara. (a)(i), of the Rotterdam Rules). The Working Group may wish to confirm this understanding. The Working Group may also wish to note that draft articles 23 on replacement and 25 on division and consolidation respectively require “presentation” of the paper-based transferable document or the electronic transferable record.

13. Draft article 20 reflects the understanding of the Working Group that the functional equivalent of “endorsement” would be achieved when both requirements under draft article 8 (writing) and 9 (signature) are met (A/CN.9/768, para. 46). The Working Group may wish to consider whether to retain draft article 20 as a separate article or simply note this possibility.

14. Under the current approach, if both delivery and endorsement are required for the transfer of a paper-based transferable document or instrument, transfer of control of an electronic transferable record in accordance with draft article 21 without meeting the endorsement requirement would result in the transferee being in control of the record, despite not being the rightful holder. The Working Group may wish to consider whether this is the correct understanding or whether transfer of control should be understood as having met the endorsement requirement, if any.

15. With regard to the possibility of requiring or including a statement indicating transfer(s) in an electronic transferable record (A/CN.9/WG.IV/WP.122, draft article 19, para. 5), the Working Group noted that such a requirement or inclusion might introduce additional burden not present in substantive law and would frustrate the circulation of an electronic transferable record to bearer (A/CN.9/768, para. 91). In response, it was said that consideration should be given to how to record the chain of endorsements in electronic transferable records issued to a named person so as to enable the action of recourse. The Working Group may wish to consider whether draft article 20 is sufficient for this purpose.

**“Draft article 21. Transfer of an electronic transferable record**

“1. To transfer the electronic transferable record, the holder shall transfer the control of the record to the transferee.

“2. Subject to any rule of law governing the transfer of a paper-based transferable document or instrument, an electronic transferable record issued to bearer may be transferred to a named person and an electronic transferable record issued to a named person may be transferred to bearer.”

**Remarks**

16. The Working Group agreed that rules on the transfer of control should be prepared (A/CN.9/761, paras. 50-58). Paragraph 1 of draft article 21 should be understood as stating that transferring control of the electronic transferable record is necessary in order to transfer the electronic transferable record, and that further transfer requirements may exist under the substantive law (A/CN.9/768, para. 87).

17. The effectiveness or validity of the transfer of an electronic transferable record would depend on whether the transfer meets the requirements under the substantive law. In that context, draft article 21 does not aim to list all the requirements for an effective transfer nor to deal with consequences of the lack thereof (A/CN.9/768, para. 89).

18. Paragraph 2 reflects the Working Group's discussion that transfer of control should allow for change in the manner of transmission of an electronic transferable record to the bearer if the record had been issued to a named person and vice versa (A/CN.9/761, para. 55, and A/CN.9/768, para. 88).

19. The Working Group may wish to further consider whether transfer of control would be achieved through the amendment of an electronic transferable record (A/CN.9/761, para. 49) and, if not, whether draft article 21 should include rules on the procedure for transfer of control distinct from that for amendment.

20. The Working Group may wish to further discuss the need to include provisions on the transfer of partial rights in the electronic transferable record.

***“Draft article 22. Amendment of an electronic transferable record***

“1. [Subject to any rule of law governing a [corresponding] paper-based transferable document or instrument], a reliable procedure for amendment of information in an electronic transferable record shall be provided whereby the amended information is reflected in the electronic transferable record and is readily identifiable as such.

“2. Upon amendment, a statement to the effect that an amendment has taken place shall be included in the electronic transferable record.”

**Remarks**

21. The Working Group agreed that the draft provisions should acknowledge the need to address amendments and their effectiveness, while issues of establishing which party could make such amendments and under what circumstances should be left to substantive law (A/CN.9/761, para. 49).

22. The term “amendment” could be understood in a broad sense to refer to any change or addition of information contained in an electronic transferable record, but for sake of clarity and to avoid unintended consequences, the meaning of that term would need to be qualified (A/CN.9/768, para. 96). This would also be closely related to whose consent is required for the amendment to be effective.

23. The following are issues to be considered by the Working Group. First, as mentioned above (see para. 19 above), the Working Group may wish to consider whether transfer of control would be achieved through an amendment of information about the holder (unless transferred to bearer). If not, a separate procedure should be provided in draft article 21 (A/CN.9/WG.IV/WP.122, paras. 32 and 36). Second, if the amendment relates to a change in the obligation specified in the electronic transferable record, the substantive law would generally require the consent of the obligor for such amendments. Third, there may be instances where the holder may amend the record unilaterally (for example, when an endorsement is made) (A/CN.9/761, para. 37, and A/CN.9/768, para. 96).

24. So as to achieve functional equivalence, paragraph 1 of draft article 22 states that when amendment of a paper-based transferable document or instrument is permitted under substantive law, a reliable procedure should be in place so that the amended information is reflected in the electronic transferable record and is readily identifiable as such (A/CN.9/768, para. 93). The Working Group may wish to consider whether the words in square brackets is appropriate and if not, whether the following words “where any rule of law governing a



[corresponding] paper-based transferable document or instrument permits amendments” may be more appropriate.

25. With respect to paragraph 2 of draft article 22, the Working Group may wish to consider whether such a statement shall be included in the electronic transferable record or whether the fact that the amended information is readily identifiable as such in paragraph 1 is sufficient. The Working Group may wish to note that other information about the amendment (for example, the identity of the person requesting the amendment or time of request) might also need to be included in the electronic transferable record.

26. If the substantive law required that parties affected by the amendment should consent to or be notified with respect to the amendment of a paper-based document or instrument, the same requirement shall apply to the amendment of an electronic transferable record (A/CN.9/768, para. 95). The Working Group may wish to confirm its understanding that this need not be stated in the draft article.

***“Draft article 23. Replacement***

“1. If a paper-based transferable document or instrument has been issued and the holder and the [issuer/obligor] agree to replace that document or instrument with an electronic transferable record:

(a) The holder shall present [for replacement] the paper-based transferable document or instrument to the [issuer/obligor];

(b) The [issuer/obligor] shall issue to the holder, in place of the paper-based transferable document or instrument, an electronic transferable record in accordance with draft article 14 that includes all information contained in the paper-based transferable document or instrument and a statement to the effect that it replaced the paper-based transferable document or instrument; and

(c) Upon issuance of the electronic transferable record, the paper-based transferable document or instrument ceases to have any effect or validity.

“2. If an electronic transferable record has been issued and the holder and the [issuer/obligor] agree to replace that electronic transferable record with a paper-based document or instrument:

(a) The holder shall present [for replacement] the electronic transferable record to the [issuer/obligor];

(b) The [issuer/obligor] shall issue to the holder, in place of the electronic transferable record, a paper-based document or instrument that includes all information contained in the electronic transferable record and a statement to the effect that it replaced the electronic transferable record; and

(c) Upon issuance of the paper-based document or instrument, the electronic transferable record ceases to have any effect or validity.

“3. The consent of the parties required in paragraphs 1 and 2 may be given at any time prior to the replacement.”

**Remarks**

27. Draft article 23 was prepared based on article 10 of the Rotterdam Rules on replacement (A/CN.9/761, paras. 72-77). As defined in draft article 3, “replacement” refers only to the change in the medium with the legal status and information contained in the document, instrument or record unchanged. As noted (see A/CN.9/WG.IV/WP.124, para. 23), the Working Group may wish to consider whether this limited definition is appropriate for the draft provisions or if it should be broadened to include instances where an electronic transferable record was issued to substitute another electronic transferable record (for example, when the electronic transferable record was damaged or when the holder lost the password to the electronic transferable record). The draft provisions currently do not contain draft provisions dealing with such circumstances.

28. The Working Group might further discuss which parties should need to consent to or otherwise be involved in the replacement in addition to the holder as it is very unlikely that

the substantive law would have any provision regarding the change of medium (A/CN.9/761, para. 76). While a replacement would generally require the consent of the obligor(s), the obligor would, in such a case, be able to request a replacement when the document, instrument or record for performance is presented (A/CN.9/768, para. 101). Thus, requiring the obligor's consent for replacement occurring prior to presentation might not be necessary.

29. As mentioned above (see A/CN.9/WG.IV/WP.124, para. 49), when a paper-based transferable document or instrument issued in multiple originals is to be replaced with an electronic transferable record, all of the originals should be presented for replacement (A/CN.9/768, para. 73).

30. The Working Group may also wish to consider whether paragraph 2, subparagraph (b), touches upon a matter of substantive law as it deals with the issuance of a paper-based transferable document or instrument.

31. Paragraph 3 of draft article 23 states the possibility of prior consent by the parties to replacement (for example, upon issuance).

***“Draft article 24. Reissuance in the original medium***

“1. A reliable procedure for the reissuance of a paper-based transferable document or instrument or of an electronic transferable record in the original medium prior to its replacement in accordance with draft article 23 shall be provided.”

**Remarks**

32. Draft article 24 addresses circumstances where the replaced document or record would need to be restored, for example, when the new substitute document, instrument or record had not been effectively issued or had been lost (A/CN.9/761, para. 76). The Working Group may wish to consider whether the draft article should remain separate (A/CN.9/768, para. 101) or be combined with draft article 23 on replacement.

***“Draft article 25. Division and consolidation of an electronic transferable record***

“1. [Subject to any rule of law governing a [corresponding] paper-based transferable document or instrument], a reliable procedure to provide for the division or consolidation of electronic transferable records shall be provided.”

[“1. If an electronic transferable record has been issued and the holder and the [issuer/obligor] agree to divide the electronic transferable record into two or more electronic transferable records:

(a) The holder shall present [for division] the electronic transferable record to the [issuer/obligor];

(b) Two or more new electronic transferable records shall be issued in accordance with draft article 14 and include: (i) a statement to the effect that division has taken place; (ii) date of division; and (iii) information to identify the pre-existing electronic transferable record and the new electronic transferable records; and

(c) Upon division, the pre-existing electronic transferable record ceases to have any effect or validity and shall include: (i) a statement to the effect that division has taken place; (ii) date of division; and (iii) information to identify the resulting new electronic transferable records.

“2. If the holder of two or more electronic transferable records, the [issuer/obligor] of which is the same, agrees with the [issuer/obligor] to consolidate the electronic transferable records into a single electronic transferable record:

(a) The holder shall present [for consolidation] the electronic transferable records to the [issuer/obligor];

(b) The consolidated electronic transferable record shall be issued in accordance with draft article 14 and include: (i) a statement to the effect that consolidation has taken place; (ii) date of consolidation; and (iii) information to identify the pre-existing electronic transferable records;

(c) Upon consolidation, the pre-existing electronic transferable records cease to have any effect or validity and shall include: (i) a statement to the effect that consolidation has taken place; (ii) date of consolidation; and (iii) information to identify the consolidated electronic transferable record.”]

### Remarks

33. Whether division or consolidation could take place is a matter of substantive law and the draft articles on division and consolidation would operate only when permitted under substantive law (A/CN.9/768, para. 100). The Working Group may wish to consider whether the words in square brackets are appropriate and if not, whether the following words “where any rule of law governing a [corresponding] paper-based transferable document or instrument permits division or consolidation” may be more appropriate.

34. The Working Group, however, also noted that the electronic environment made it easier to divide and consolidate electronic transferable records (A/CN.9/768, para. 100). Moreover, while the substantive law may have provisions on whether division or consolidation may take place in a paper-based environment, it would be unlikely that the substantive law would also provide procedures for division or consolidation in an electronic environment. Therefore, it may be necessary to set forth a specific procedure. Draft article 25 in square brackets has been prepared on the basis of article 10 of the Rotterdam Rules and draft article 23 on replacement for the Working Group’s consideration.

#### *“Draft article 26. Termination of an electronic transferable record*

“1. A reliable method shall be provided to prevent further circulation of the electronic transferable record [upon its termination] [when an electronic transferable record ceases to have effect or validity].

“2. Where the law requires that a statement to indicate the termination of a paper-based transferable document or instrument be included in the document or instrument, that requirement is met by including a statement in the electronic transferable record to the effect that it has been terminated.”

### Remarks

35. In general, when an electronic transferable record ceases to have effect or validity is a matter of substantive law (A/CN.9/768, para. 104). The termination of the underlying performance obligation is also a matter of substantive law (A/CN.9/761, para. 78).

36. The Working Group may wish to confirm the understanding that the draft provisions need to deal with termination of an electronic transferable record only when a replacement, division or consolidation takes place in accordance with draft articles 23 and 25 as the procedure set out therein foresees the termination of replaced or pre-existing documents, instruments or records as the case might be.

37. Paragraph 1 aims at achieving the operation of the rules on termination in the substantive law in an electronic environment and states that a method that would achieve the functional equivalence of “destruction” of a paper-based transferable document or instrument should be provided in an electronic environment.

38. Paragraph 2 replicates the requirement to include annotations indicating termination in a paper-based documents or instrument. The Working Group may wish to consider whether paragraph 1 is sufficient and there is no need to retain paragraph 2.

39. The Working Group may also wish to consider whether a definition of the term “termination” should be included in draft article 3.

#### *“Draft article 27. The use of an electronic transferable record for security right purposes*

“1. [Subject to any rule of law governing a paper-based transferable document or instrument], a reliable procedure to allow the use of electronic transferable records for security right purposes shall be provided.”

### Remarks

40. Draft article 27 provides a general statement that a reliable procedure should be provided so that an electronic transferable record may be used for security right purposes with the understanding that the substantive law may already provide relevant rules, which would govern the procedure for creating a security right in that document or instrument (A/CN.9/768, para. 105).

41. The UNCITRAL Legislative Guide on Secured Transactions (2007) defines a security right as a property right in a movable asset that is created by agreement and secures payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right.

#### *“Draft article 28. Retention of [information in] an electronic transferable record*

“1. Where the law requires that a paper-based transferable document or instrument [or information therein] be retained, that requirement is met by retaining an electronic transferable record [or information therein] provided that the following conditions are satisfied:

(a) The information contained therein is accessible so as to be usable for subsequent reference;

(b) The integrity of the electronic transferable record is assured in accordance with draft article 12; and

(c) Information, if any, enabling the identification of the issuer and holder of the electronic transferable record and the date and time when it was issued and transferred as well as when it ceases to have any effect or validity is made available.”

### Remarks

42. Draft article 28 deals with the storage of information in electronic transferable records and was prepared based on article 10 of the UNCITRAL Model Law on Electronic Commerce (A/CN.9/761, para. 81, and A/CN.9/768, para. 106). Subparagraph (b) focuses on the integrity of the record (A/CN.9/768, para. 106), yet the Working Group may wish to consider whether subparagraphs (b) and (c) deal with the same matter. The Working Group may also wish to consider whether subparagraph (c) should state that all the information in the electronic transferable record should be made available rather than listing certain types of information.

43. The Working Group may wish to consider whether a separate rule should be prepared for the retention of a paper-based transferable document or instrument or an electronic transferable record when replacement has taken place in accordance with draft article 23. It may wish to further consider whether this draft article should be expanded to cover the possibility of archiving and storing paper-based transferable documents or instruments in an electronic manner (without necessarily replacing it with an electronic transferable record).

## D. Third-party service providers

44. Based on articles 9 and 10 of the UNCITRAL Model Law on Electronic Signatures, the following draft articles dealing with third-party service providers have been revised in light of the considerations by the Working Group, being particularly mindful of the principle of technological neutrality (A/CN.9/768, paras. 107-110). They are provided for guidance purposes only, encompassing all third-party service providers (A/CN.9/761, para. 27). The placement of these articles would depend on the final form of the draft provisions.

#### *“Draft article 29. Conduct of a third-party service provider*

“1. Where a third-party service provider supports the use of an electronic transferable record, that third-party service provider shall:

(a) Act in accordance with statements made by it with respect to its policies and practices;

- (b) Exercise reasonable care to ensure the accuracy of all statements made by it;
- (c) Provide reasonably accessible means that enable a relying party to ascertain from an electronic transferable record information about it;
- (d) Provide reasonably accessible means that enable a relying party to ascertain, where relevant, from an electronic transferable record:
  - (i) The method used to identify the [issuer/obligor] and the holder;
  - (ii) That the electronic transferable record retained its integrity and has not been compromised;
  - (iii) Any limitation on the scope or extent of liability stipulated by the third-party service provider;
- (e) Use trustworthy systems, procedures and human resources in performing its services.”

**“Draft article 30. Trustworthiness**

“For the purposes of article 29, paragraph 1 (e) in determining whether, or to what extent, any systems, procedures and human resources utilized by a third-party service provider are trustworthy, regard may be had to the following factors:

- (a) Financial and human resources, including existence of assets;
- (b) Quality of hardware and software systems;
- (c) Procedures for processing of electronic transferable record;
- (d) Availability of information to related parties;
- (e) Regularity and extent of audit by an independent body;
- (f) The existence of a declaration by the State, an accreditation body or the third-party service provider regarding compliance with or existence of the foregoing; and
- (g) Any other relevant factor.”

## **E. Cross-border recognition of electronic transferable records**

**“Draft article 31. Non-discrimination of foreign electronic transferable records**

“1. Nothing in this Law affects the application of the conflict of laws rules governing a paper-based transferable document or instrument.

“2. [An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it was issued or used in a foreign State.] [In determining whether, or to what extent, an electronic transferable record is legally effective, valid or enforceable, no regard shall be had to the location where the electronic transferable record is issued or used.]”

### **Remarks**

45. At the forty-fifth session of the Commission, in 2012, the need for an international regime to facilitate the cross-border use of electronic transferable records was emphasized.<sup>1</sup> The Working Group also reiterated the importance of cross-border aspects of legal recognition of electronic transferable records (A/CN.9/761, paras. 87-89).

46. Paragraph 1 reflects the Working Group’s understanding that the draft provisions should not displace existing private international law rules applicable to paper-based transferable documents or instruments (A/CN.9/768, para. 111). The Working Group may

<sup>1</sup> *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 83.

wish to consider whether to retain paragraph 1 for greater certainty or whether draft article 1, paragraph 2, is sufficient.

47. It was noted, however, that the possibility of discriminating against a foreign electronic transferable record by virtue of its origin only (or of a technology used in the electronic transferable record, for example a foreign electronic signature), should be discouraged and may deserve additional consideration. Paragraph 2 aims at addressing such concerns. Yet, it should be noted that the draft provisions do not include any reference to the “location where electronic transferable record is issued or used” other than in draft article 31.

## C. Note by the Secretariat on legal issues relating to the use of electronic transferable records

(A/CN.9/WG.IV/WP.125)

[Original: English]

The following note provides information about the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 7 June 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 19 March 1931) for consideration by the Working Group in relation to the draft provisions on electronic transferable records.

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### I. Introduction

1. At its forty-fourth session, in 2011, the Commission mandated the Working Group to undertake work in the field of electronic transferable records.<sup>1</sup>

2. At the forty-sixth session of the Working Group (Vienna, 29 October-2 November 2012), it was widely felt that generic rules based on a functional approach should be developed encompassing various types of electronic transferable records and broad support was expressed for the preparation of draft provisions in the form of a model law, without prejudice to the decision on the final form (A/CN.9/761, paras. 18 and 93).

3. At its forty-seventh session (New York, 13-17 May 2013), the Working Group began review of the draft provisions on electronic transferable records contained in document A/CN.9/WG.IV/WP.122 with the general understanding that its work should be guided by the principles of functional equivalence and technological neutrality, and should not deal with matters governed by the substantive law (A/CN.9/768, para. 14).

4. At that session, upon considering draft article 1 on the scope of the draft provisions, a question was raised with respect to the compatibility between the use of electronic transferable records, on the one hand, and the provisions contained in the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930, hereinafter referred to as the "Convention on Bills of Exchange and Promissory Notes")<sup>2</sup> and the Convention Providing a Uniform Law for Cheques (Geneva, 1931, hereinafter "Convention on Cheques" and jointly referred to as the "Geneva Conventions").<sup>3</sup> This was due to the fact that the Geneva Conventions were prepared in the paper-based context, assuming only the use of paper-based instruments (A/CN.9/WG.IV/WP.122, para. 5).

5. One view was that the paper-based provisions of the Geneva Conventions were not compatible with the use of electronic transferable records. Therefore, it was suggested that those instruments should be excluded from the scope of the draft provisions (A/CN.9/768, para. 20).

6. In response, it was noted that adequate legislative techniques had been developed to address the matter of functional equivalence between written and electronic form. It was, therefore, suggested that bills of exchange, promissory notes and cheques should be included in the scope of the draft provisions, following the Working Group's understanding that generic rules should encompass various types of electronic transferable records. It was further noted that establishing functional equivalence to overcome obstacles to the use of

<sup>1</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 238.

<sup>2</sup> League of Nations, *Treaty Series*, vol.143, p.257.

<sup>3</sup> League of Nations, *Treaty Series*, vol.143, p.355.

electronic means arising from existing provisions requiring the use of paper-based documents, had been a constant goal of the Working Group (A/CN.9/768, para. 21).

7. At the forty-sixth session of the Commission, in 2013, a view was expressed that work on electronic transferable records should take into consideration the Geneva Conventions, as dematerialization or introduction of electronic equivalents of instruments governed by those Conventions might create legal difficulties in States parties to those Conventions.<sup>4</sup>

8. Accordingly, this note was prepared to provide information about the Geneva Conventions for the consideration by the Working Group with respect to its work on electronic transferable records.

## II. Geneva Conventions

### A. Convention on Bills of Exchange and Promissory Notes (1930)

9. The Convention on Bills of Exchange and Promissory Notes was adopted in Geneva on 7 June 1930 and entered into force on 1 January 1934.<sup>5</sup>

10. Prepared under the auspices of the League of Nations, the Convention on Bills of Exchange and Promissory Notes aims at unifying the substantive law governing bills of exchange and promissory notes as provided in its Annex I. The Convention consists of general treaty provisions (Articles I to XI), Annex I and Annex II. Annex I consists of two Titles, one on bills of exchange (arts. 1 to 74) and the other on promissory notes (arts. 75 to 78). Consisting of 12 chapters, Title I covers the issuance and form; endorsement; acceptance; avals; maturity; payment; recourse for non-acceptance and non-payment; intervention for honour; parts of a set and copies; alterations and limitation of actions; and general provisions. Title II is rather short, as article 77 extends most of the provisions on bills of exchange to promissory notes. Annex II, which consists of 23 articles, lists permissible reservations by States.

11. The Convention has 26 States parties: Austria, Azerbaijan, Belarus, Belgium, Brazil, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Japan, Kazakhstan, Kyrgyzstan, Lithuania, Luxembourg, Monaco, Netherlands, Norway, Poland, Portugal, Sweden, Switzerland, Russian Federation and Ukraine.<sup>6</sup> Seven (7) States had signed but not ratified the Convention: Colombia, former Czechoslovakia, Ecuador, Peru, Spain, Turkey, and former Yugoslavia.

12. It should be noted that Kyrgyzstan lodged a reservation to the Convention stating that a bill of exchange or a promissory note may be drawn up only on paper (paper product) (paras. 2 and 9 of the reservation).

13. The following two conventions were prepared in conjunction with and to complement the Convention on Bills of Exchange and Promissory Notes: (i) the Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes (1930); and (ii) the Convention on the Stamp Laws in connection with Bills of Exchange and Promissory Notes (1930).

<sup>4</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 226.

<sup>5</sup> Information about the status of the Convention is available from the depositary at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-10.en.pdf>.

<sup>6</sup> The following 18 States had ratified or definitively acceded to the Convention: Austria, Belgium, Brazil, Denmark, Finland, France, Germany, Greece, Italy, Japan, Monaco, Netherlands, Norway, Poland, Portugal, Sweden, Switzerland and Russian Federation. Eight (8) States ratified, acceded, or succeeded to the Convention subsequent to the assumption of depositary functions by the Secretary-General: Azerbaijan, Belarus, Hungary, Kazakhstan, Kyrgyzstan, Lithuania, Luxembourg and Ukraine.



## B. Convention on Cheques (1931)

14. The Convention on Cheques was adopted in Geneva on 19 March 1931 and entered into force on 1 January 1934.<sup>7</sup>

15. Also prepared under the auspices of the League of Nations, the Convention on Cheques aims at unifying the substantive law governing cheques as provided in its Annex I. The Convention consists of general treaty provisions (Articles I to XI), Annex I and Annex II. Annex I, consisting of 10 chapters, provides a uniform law on cheques: the drawing and form of a cheque; negotiation; avals; presentment and payment; crossed cheques and cheques payable in account; recourse for non-payment; parts of a set; alterations; limitation of actions; and general provisions. Annex II, which consists of 31 articles, lists permissible reservations by States.

16. The Convention has 25 States parties: Austria, Azerbaijan, Belgium, Brazil, Denmark, Finland, France, Germany, Greece, Hungary, Indonesia, Italy, Japan, Liberia, Lithuania, Luxembourg, Malawi, Monaco, Netherlands, Nicaragua, Norway, Poland, Portugal, Sweden and Switzerland.<sup>8</sup> Seven (7) States had signed but not ratified the Convention: former Czechoslovakia, Ecuador, Mexico, Romania, Spain, Turkey and former Yugoslavia.

17. The following two conventions were prepared in conjunction with and to complement the Convention on Cheques: (i) the Convention for the Settlement of Certain Conflicts of Laws in connection with Cheques (1931); and (ii) the Convention on the Stamp Laws in connection with Cheques (1931).

## C. Paper-based provisions of the Geneva Conventions

18. The Geneva Conventions were drafted and adopted when information of commercial nature was stored predominantly in the paper form. Computers or the Internet did not exist, much less the modern concepts of electronic commerce. As a result, the provisions in the Geneva Conventions assume the use of paper as it was the only form of medium for bills of exchange, promissory notes and cheques.

19. For example, the words “written” and “writing” are used throughout the Convention on Bills of Exchange and Promissory Notes (Annex I, arts. 5, 9, 12, 13, 16, 25, 29 and 46) and the Convention on Cheques (Annex I, arts. 16, 37, 39, 40 and 43). The words “signature” and “sign” are also used in the Convention on Bills of Exchange and Promissory Notes (Annex I, arts. 1, 7, 8, 13, 16, 25, 29, 30, 31, 40, 45, 46, 47, 54, 56, 57, 65, 69, 75 and 77) and the Convention on Cheques (Annex I, arts. 1, 10, 11, 16, 19, 25, 26, 35, 42, 43, 44, 48, 50 and 51). As to these form requirements, draft articles 8 and 9 contained in document A/CN.9/WG.IV/WP.124 may provide rules to achieve functional equivalence.

20. Some other examples of the paper-based provisions in the Geneva Conventions are as follows (emphasis added in italics):

### **Convention on Bills of Exchange and Promissory Notes: Annex I. Uniform law on bills of exchange and promissory notes**

#### **Article 13**

An endorsement must be written on the bill of exchange or on a *slip affixed* thereto (*allonge*). ... In the latter case, the endorsement, to be valid, must be written on the back of the bill of exchange or on the *slip attached* thereto (*allonge*).

<sup>7</sup> Information about the status of the Convention is available from the depositary at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-11.en.pdf>.

<sup>8</sup> The following 16 States had ratified or definitively acceded to the Convention: Brazil, Denmark, Finland, France, Germany, Greece, Italy, Japan, Monaco, Netherlands, Nicaragua, Norway, Poland, Portugal, Sweden, and Switzerland. Nine (9) States have ratified, acceded, or succeeded to the Convention subsequent to the assumption of depositary functions by the Secretary-General: Austria, Azerbaijan, Belgium, Hungary, Indonesia, Liberia, Lithuania, Luxembourg and Malawi.

**Article 25**

An acceptance is written on the bill of exchange. It is expressed by the word “accepted” or any other equivalent term. It is signed by the drawee. The simple signature of the drawee on the *face* of the bill constitutes an acceptance.

When the bill is payable at a certain time after sight, or when it must be *presented* for acceptance within a certain limit of time in accordance with a special stipulation the acceptance must be dated as of the day when the acceptance is given unless the holder requires it shall be dated as of the day of *presentation*.

**Article 31**

The “aval” is given either on the *bill itself* or on an “*allonge*”. It is expressed by the words “good as aval” (“bon pour aval”) or by any other equivalent formula. It is signed by the giver of the “aval”. It is deemed to be constituted by the mere signature of the giver of the “aval” placed on the *face* of the bill, except in the case of the signature of the drawee or of the drawer.

**Article 54**

Should the *presentation* of the bill of exchange or the drawing up of the protest within the prescribed limits of time be prevented by an insurmountable obstacle (legal prohibition (prescription légale) by any State or other case of vis major), these limits of time shall be extended. The holder is bound to give notice without delay of the case of vis major to his endorser and to specify this notice, which he must *date and sign, on the bill or on an allonge*; in other respects the provisions of Article 45 shall apply.

When vis major has terminated the holder must without delay *present* the bill of exchange for acceptance or payment and, ....

**Convention on Cheques: Annex I. Uniform law on cheques****Article 16**

An endorsement must be written on the cheque or on a *slip affixed* thereto (*allonge*). ... In the latter case, the endorsement, to be valid, must be written on the back of the cheque or on the *slip attached* thereto (*allonge*).

**Article 37**

The drawer or holder of a cheque may *cross* it with the effects stated in the next article hereof. A crossing takes the form of *two parallel lines drawn on the face* of the cheque. ... The crossing is general if it consists of *the two lines only or if between the lines* the term “banker” or some equivalent is inserted; it is special if the name of a banker is *written between the lines*. A general *crossing* may be converted into a special *crossing*, but a special crossing may not be converted into a general *crossing*.

**Article 38**

A cheque which is *crossed* generally can be paid by the drawee only to a banker or to a customer of the drawee. A cheque which is *crossed* specially can be paid by the drawee only to the named banker, or if the latter is the drawee, to his customer. Nevertheless, the named banker may procure the cheque to be collected by another banker. A banker may not acquire a *crossed* cheque except from one of his customers or from another banker. He may not collect it for the account of other persons than the foregoing. A cheque bearing several special *crossings* may not be paid by the drawee except in a case where there are *two crossings*, one of which is for collection through a clearing-house.

**Article 39**

The drawer or the holder of a cheque may forbid its payment in cash by *writing transversally across the face* of the cheque the words “payable in account” (“à porter en compte”) or a similar expression.

### III. Considerations

21. It is quite obvious that the provisions of the Geneva Conventions were prepared for the paper-based environment. The question arises whether States parties to the Geneva Conventions would be able to introduce electronic bills of exchange, promissory notes and cheques. The answer to this question would have an impact on the scope of the draft provisions on electronic transferable records, its final form and adoption of the finalized text by States parties to the Geneva Conventions. For instance, if the final form were to be a model law, States parties to the Geneva Conventions may simply choose not to apply the model law provisions to bills of exchange, promissory notes or cheques.

22. If the paper-based provisions of the Geneva Conventions are to be strictly interpreted to permit only paper-based bills of exchange, promissory notes and cheques, States parties to those Convention would not be able to introduce the electronic equivalent of bills of exchange, promissory notes or cheques, without being in breach of the respective Convention. Under such circumstance, if those States were to introduce electronic equivalent of bills of exchange, promissory notes or cheques, they would have the option of requesting amendment of some or all of the provisions of the Geneva Conventions in accordance with Article IX,<sup>9</sup> or denouncing the Geneva Conventions in accordance with Article VIII. Making reservations with respect to paper-based provisions may present challenges as States parties are generally prohibited from making reservations after ratification or accession (Article I of the Geneva Conventions) except with regard to certain provisions in Annex II (Convention on Bills of Exchange and Promissory Notes, Annex II, arts. 8, 12 and 18, Convention on Cheques, Annex II, arts. 9, 22, 27 and 30) and only in urgent cases (Convention on Bills of Exchange and Promissory Notes, Annex II, arts. 7 and 22, Convention on Cheques, Annex II, arts. 17 and 28).

23. Under such a strict interpretation, an alternative for States parties to the Geneva Conventions could be to introduce new electronic instruments that fulfil the functions of bills of exchange, promissory notes or cheques, without necessarily denominating them as such. An example can be found in the Electronically Recorded Monetary Claims Act (Act No. 102 of 2007, “ERMCA”) of Japan,<sup>10</sup> which provides rules on electronically recorded monetary claims, monetary claims for which electronic records in the registry are required for their assignment. It should also be noted that other electronic means, for example, wire transfers, have been developed to fulfil the functions that used to be served by promissory notes or cheques.

24. Although the Geneva Conventions contain provisions that allude to the use of paper-based bills of exchange, promissory notes and cheques, they do not have any explicit reference to the use of the “paper” form (except for the reservation lodged by Kyrgyzstan). Accordingly, it may be possible to interpret the Geneva Conventions as not explicitly precluding the use of the electronic medium as the electronic environment did not exist when the Geneva Conventions were drafted. Adopting this rather flexible interpretation would allow States parties to the Geneva Conventions to develop rules on electronic equivalents of bills of exchange, promissory notes or cheques without being in breach of the Geneva Conventions.

25. It should be noted that one of the key objectives of UNCITRAL is to promote legal certainty in international trade. Moreover, establishing functional equivalence to overcome obstacles to the use of electronic means arising from existing provisions requiring the use of paper-based documents has been the constant goal of the Working Group on Electronic Commerce (A/CN.9/768, para. 21). Consequently, the Working Group may wish to consider adequate legislative techniques to address the matter of functional equivalence between

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<sup>9</sup> **Article IX.** Every Member of the League of Nations and every non-Member State in respect of which the present Convention is in force, may forward to the Secretary-General of the League of Nations, after the expiry of the fourth year following the entry into force of the Convention, a request for the revision of some or all of the provisions of this Convention. If such request, after being communicated to the other Members or non-Member States between which the Convention is at that time in force, is supported within one year by at least six of them, the Council of the League of Nations shall decide whether a Conference shall be convened for the purpose.

<sup>10</sup> ERMCA came into force in Japan on 1 December 2008, for the purposes of facilitating businesses’ financing activities.

paper-based provisions in the Geneva Conventions as it had done with respect to the writing and signature requirements. Furthermore, it should be noted that other international conventions, treaties or agreements (hereinafter “international instruments”) as well as domestic legislations on paper-based transferable documents or instruments may contain provisions similar to the paper-based provisions of the Geneva Conventions. Overall, such an exercise would assist in achieving the goal of the Working Group to prepare generic rules encompassing various types of electronic transferable records.

26. The interaction between the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) as well as the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) and the United Nations Convention on the Use of Electronic Communications in International Contracts (the “Electronic Communications Convention”) could be an example. Certain formal requirements contained in the New York Convention and the CISG posed obstacles to the wide use of electronic communications and thus, the Electronic Communications Convention aimed at removing those formal obstacles by establishing equivalence between electronic and written form.

27. In this context, the Working Group may wish to consider the mechanism employed in article 20 of the Electronic Communications Convention.<sup>11</sup> The aim of article 20 is to remove possible legal obstacles to electronic commerce that might arise under existing international instruments, without formally amending any international instrument or providing an authentic interpretation of such international instrument. The combined effect of paragraphs 1 and 2 of article 20 is that by becoming a party to the Electronic Communications Convention, a State would automatically undertake to apply the provisions of the Electronic Communications Convention to electronic communications exchange in connection with any of the international instruments to which a State is or may become a Contracting Party.

28. Without prejudice to the decision on the final form of work, the Working Group may wish to consider taking an approach similar to article 20 of the Electronic Communications Convention. This could be done by adopting a protocol to the Electronic Communications Convention that would enable the use of electronic transferable records in conjunction with existing international instruments that regulate paper-based transferable documents or instruments. This would not only be limited to the Geneva Conventions but other international instruments, for example, the United Nations Convention on the International Bills of Exchange and International Promissory Notes, the United Nations Convention on the Carriage of Goods by Sea (the “Hamburg Rules”) and the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague-Visby Rules).

29. It should be further noted that the United Nations Convention on International Bills of Exchange and International Promissory Notes and the Hamburg Rules were not included in the list provided in article 20 of the Electronic Communications Convention. At that time, it was considered that possible problems relating to the use of electronic communications under those Conventions, as well as other international instruments dealing with negotiable instruments or transport documents, might require specific treatment and that it would not be appropriate to address those problems in the Electronic Communications Convention (A/CN.9/527, paras. 27-41).

30. The interaction between the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration (with amendments adopted in 2006) is another example of legislative technique. The original 1985 version of the Model Law closely followed article II (2) of the New York Convention with respect to the definition and form of arbitration agreement and required that an arbitration agreement be in writing. The revised article 7 of the 2006 Model Law offers two options. The first approach follows the detailed

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<sup>11</sup> Article 20, paragraph 1 states that the provisions of the Electronic Communications Convention apply to the use of electronic communications in connection with the formation or performance of a contract to which any of the international conventions, to which a Contracting State to the Electronic Communications Convention is or may become a Contracting State, and lists six international conventions including the New York Convention and the CISG. Article 20, paragraph 2, further extends paragraph 1 to international convention, treaty or agreement not specifically referred to in paragraph 1, unless the State has made a declaration not to be bound.

structure of the original 1985 text. It follows the New York Convention in requiring the written form of the arbitration agreement but recognizes a record of the “contents” of the agreement “in any form” as equivalent to traditional “writing”. The agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded. This new rule is significant in that it no longer requires the signature of the parties or an exchange of messages between the parties. It modernizes the language referring to the use of electronic commerce by adopting wording inspired from the 1996 UNCITRAL Model Law on Electronic Commerce and the Electronic Communications Convention. The second approach in the revised article 7 defines the arbitration agreement in a manner that omits any form requirement.

31. When adopting the amendments to the UNCITRAL Model Law on International Commercial Arbitration in 2006, the Commission also adopted a “Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006) (hereinafter “the Recommendation”)”, which provides another example of legislative technique. The Recommendation was drafted in recognition of the increasing use of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the New York Convention in respect of the form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards.

32. The Recommendation encourages States to apply article II (2) of the New York Convention “recognizing that the circumstances described therein are not exhaustive”. In addition, the Recommendation encourages States to adopt the revised article 7 of the UNCITRAL Model Law on International Commercial Arbitration.

33. In any case, the Working Group may wish to carefully consider the paper-based provisions of the Geneva Conventions, other international instruments and domestic legislations to first identify paper-based requirements that exist in the substantive law.

34. In doing so, it might also be worthwhile to look into the practical reasoning of such paper-based provisions. For example, requiring an endorsement on the back of the bill of exchange or on the slip affixed thereto may have been to deal with limited space on the front of the bill of exchange. Such an issue would not have much practical significance in an electronic environment.

35. Once the paper-based provisions are identified, provisions similar to draft articles 8, 9, 10, 16, 18, 19 and 20 as contained in A/CN.9/WG.IV/WP.124 and Add.1 may be prepared to achieve the functional equivalence of such requirements. For instance, the requirement that the endorsement be on the “back” or the signature be on the “face” of the paper-based bill of exchange could be met in an electronic bill of exchange when the relevant information is identifiable as such. An “*allonge*” in the paper-based context can be achieved through an electronic attachment.

36. The functional equivalent approach has enabled many types of paper-based documents to be adapted into an electronic environment. The Working Group may wish to view the paper-based provisions of the Geneva Conventions not as a legal impediment but an opportunity to interpret them in a manner that adequately reflects and accommodates the modern technological advances.

## D. Report of the Working Group on Electronic Commerce on the work of its forty-ninth session (New York, 28 April-2 May 2014)

(A/CN.9/804)

[Original: English]

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## I. Introduction

1. At its forty-second session, in 2009, the Commission requested the Secretariat to prepare a study on electronic transferable records in the light of proposals received at that session (A/CN.9/681 and Add.1, and A/CN.9/682).<sup>1</sup>

2. At its forty-third session, in 2010, the Commission had before it additional information on the use of electronic communications for the transfer of rights in goods, with particular regard to the use of registries for the creation and transfer of rights (A/CN.9/692, paras. 12-47). At that session, the Commission requested the Secretariat to convene a colloquium on relevant topics, namely, electronic transferable records, identity management, electronic commerce conducted with mobile devices and electronic single window facilities.<sup>2</sup>

3. At its forty-fourth session, in 2011, the Commission had before it a note by the Secretariat (A/CN.9/728 and Add.1) summarizing the discussions during the colloquium on electronic commerce (New York, 14-16 February 2011).<sup>3</sup> After discussion, the Commission mandated the Working Group to undertake work in the field of electronic transferable records.<sup>4</sup> It was recalled that such work would be beneficial not only for the generic promotion of electronic communications in international trade, but also to address some specific issues such as assisting in the implementation of the United Nations Convention on the Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the "Rotterdam Rules").<sup>5</sup> In addition, the Commission agreed that work regarding electronic transferable records might include certain aspects of other topics such as identity management, use of mobile devices in electronic commerce and electronic single window facilities.<sup>6</sup>

4. At its forty-fifth session (Vienna, 10-14 October 2011), the Working Group began its work on various legal issues relating to the use of electronic transferable records, including possible methodology for future work by the Working Group (A/CN.9/737, paras. 14-88). It also considered the work of other international organizations on that subject (A/CN.9/737, paras. 89-91).

5. At its forty-fifth session, in 2012, the Commission expressed its appreciation to the Working Group for the progress made and commended the Secretariat for its work.<sup>7</sup> There

<sup>1</sup> *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, para. 343.

<sup>2</sup> *Ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 250.

<sup>3</sup> Information about the colloquium is available at the date of this document from [www.uncitral.org/uncitral/en/commission/colloquia/electronic-commerce-2010.html](http://www.uncitral.org/uncitral/en/commission/colloquia/electronic-commerce-2010.html).

<sup>4</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 238.

<sup>5</sup> *Ibid.*, para. 235.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 82.

was general support for the Working Group to continue its work on electronic transferable records and the need for an international regime to facilitate cross-border use of electronic transferable records was emphasized.<sup>8</sup> In that context, the desirability of identifying and focusing on specific types of or specific issues related to electronic transferable records was mentioned.<sup>9</sup> After discussion, the Commission reaffirmed the mandate of the Working Group relating to electronic transferable records and requested the Secretariat to continue reporting on relevant developments relating to electronic commerce.<sup>10</sup>

6. At its forty-sixth session (Vienna, 29 October-2 November 2012), the Working Group continued its examination of the various legal issues that arose during the life cycle of electronic transferable records (A/CN.9/761, paras. 24-89). The Working Group confirmed the desirability of continuing work on electronic transferable records and the potential usefulness of guidance in that field. It was widely felt that generic rules based on a functional approach should be developed encompassing various types of electronic transferable records (A/CN.9/761, paras. 17-18). As to future work, broad support was expressed for the preparation of draft provisions on electronic transferable records to be presented in the form of a model law, without prejudice to the decision to be made by the Working Group on the final form (A/CN.9/761, paras. 90-93).

7. At its forty-seventh session (New York, 13-17 May 2013), the Working Group had the first opportunity to consider the draft provisions on electronic transferable records. It was reaffirmed that the draft provisions should be guided by the principles of functional equivalence and technology neutrality, and should not deal with matters governed by the underlying substantive law (A/CN.9/768, para. 14). As to future work, it was noted that while the draft provisions were largely compatible with different outcomes that could be achieved, caution should be exercised to prepare a text that had practical relevance and supported existing business practices, rather than regulated potential future ones (A/CN.9/768, para. 112).

8. At its forty-sixth session, in 2013, the Commission noted that the work of the Working Group would greatly assist in facilitating electronic commerce in international trade.<sup>11</sup> After discussion, the Commission reaffirmed the mandate of the Working Group and agreed that work towards developing a legislative text in the field of electronic transferable records should continue.<sup>12</sup> It was further agreed that whether that work would extend to identity management, single windows and mobile commerce would be assessed at a future time.<sup>13</sup>

9. At its forty-eighth session (Vienna, 9-13 December 2013), the Working Group continued its work on the preparation of draft provisions on electronic transferable records. The Working Group also took into consideration legal issues related to the use of electronic transferable records in relationship with the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 7 June 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 19 March 1931) (the "Geneva Conventions") (A/CN.9/797, paras. 109-112).

## II. Organization of the session

10. The Working Group, composed of all States members of the Commission, held its forty-ninth session in New York from 28 April to 2 May 2014. The session was attended by representatives of the following States members of the Working Group: Algeria, Armenia, Austria, Belarus, Brazil, China, Colombia, Denmark, Ecuador, France, Germany, Hungary, India, Indonesia, Italy, Japan, Mexico, Nigeria, Pakistan, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, United States of America and Venezuela (Bolivarian Republic of).

<sup>8</sup> Ibid., para. 83.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid., para. 90.

<sup>11</sup> Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 227.

<sup>12</sup> Ibid., paras. 230 and 313.

<sup>13</sup> Ibid., para. 313.

11. The session was also attended by observers from the following States: Belgium, Cyprus, Libya, Malta, Poland, Qatar, Saudi Arabia and Sweden. The session was also attended by an observer from the European Union.

12. The session was also attended by observers from the following international organizations:

(a) *Intergovernmental organizations*: Maritime Organization of West and Central Africa (MOWCA) and World Customs Organization (WCO);

(b) *International non-governmental organizations*: American Bar Association (ABA), CISG Advisory Council, Comité Maritime International (CMI), European Law Students' Association (ELSA), Fédération Internationale des Associations de Transitaires et Assimilés (FIATA) and Law Association for Asia and the Pacific (LAWASIA).

13. The Working Group elected the following officers:

*Chairman*: Ms. Giusella Dolores FINOCCHIARO (Italy)

*Rapporteur*: Sr. Jair Fernando IMBACHI CERÓN (Colombia)

14. The Working Group had before it the following documents: (a) Annotated provisional agenda (A/CN.9/WG.IV/WP.127); and (b) A note by the Secretariat on draft provisions on electronic transferable records (A/CN.9/WG.IV/WP.128 and Add.1).

15. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of the draft provisions on electronic transferable records.
5. Technical assistance and coordination.
6. Other business.
7. Adoption of the report.

### III. Deliberations and decisions

16. The Working Group engaged in discussions on the draft provisions on electronic transferable records on the basis of document A/CN.9/WG.IV/WP.128 and Add.1. The deliberations and decisions of the Working Group are reflected in chapter IV below. The Secretariat was requested to revise the draft provisions to reflect those deliberations and decisions.

### IV. Draft provisions on electronic transferable records

#### Draft article 7. Legal recognition of an electronic transferable record

17. The Working Group agreed that draft article 7 should be retained in its current form.

#### Draft article 8. Writing

18. With respect to draft article 8, a suggestion was made that a functional equivalence rule for "writing" might not be necessary in the context of the use of electronic transferable records as the fulfilment of that requirement was implied in the definition of "electronic transferable record" in draft article 3. In response, it was stated that the draft provisions should contain a general rule for establishing the functional equivalence of the "writing" requirement in substantive law. It was added that a rule on the "writing" requirement was necessary in light of the other rules on functional equivalence contained in the draft provisions. After deliberation, the Working Group decided to revisit the matter after its consideration of the draft articles on original, uniqueness and integrity.



19. As a drafting matter, it was agreed that the words “the information contained therein” should replace the words “the information contained in the electronic transferable record” as the meaning was evident. Subject to that change, the Working Group agreed that draft article 8 should be retained in its current form for further consideration.

#### **Draft article 9. Signature**

20. With respect to draft article 9, it was agreed that reference in subparagraph (a) to “electronic transferable record” should be revised to “electronic record” as that article dealt with a general signature requirement in the substantive law. It was further suggested that it might be necessary to elaborate on the reference to “reliability” in subparagraph (b)(i) in the broader context of the general reliability standard set forth in draft article 11 of Option C. After discussion, the Working Group agreed that draft article 9 should be retained in its current form, subject to the changes mentioned above.

#### **Draft articles on original, uniqueness and integrity**

21. The Working Group had a general discussion about the draft articles on original, uniqueness and integrity. It was mentioned that Option B could provide a good starting point as it clearly illustrated that uniqueness and integrity were elements required to achieve the functional equivalence of original in the electronic transferable record context. It was added that the main purpose of that functional equivalence rule should be prevention of multiple claims. It was also noted that certain elements contained in draft article 10 of Option B needed to be considered with respect to draft articles relating to control.

22. After discussion, it was agreed that Option B should be the starting point for further deliberation. It was further agreed that certain aspects contained in Options A and C — in particular, article 11 of Option C setting forth a general reliability standard — could also be considered for inclusion.

23. A number of suggestions were made with regard to the placement of draft article 10 of Option B. One suggestion was to move it to Section C of the draft provisions on the “Use of electronic transferable records” as a specific rule pertaining to their use. Another suggestion was to place the notions of uniqueness and integrity in Section C, while retaining a general form requirement rule in Section B. Yet another suggestion was that uniqueness should be discussed in the context of control. During that discussion, the view was expressed that the draft articles in Section B were an application of the general rules on electronic transactions to electronic transferable records and that the scope of those draft articles should be limited to electronic transferable records and should not extend to electronic records more generally.

#### **Draft article 10. Original (Option B)**

24. With respect to paragraph 1 of draft article 10, the Working Group agreed to retain the words “the original of” outside square brackets. It was also agreed that the words “its absence” should be retained and the words “the absence of the original” deleted.

25. With respect to draft article 10(1)(a), it was said that the first set of bracketed text would better accommodate both token-based and registry-based electronic transferable records. It was added that a reference to uniqueness was necessary in order to ensure singularity and to avoid multiple claims, and that the notion of control alone could not achieve singularity given the difference between control itself and the object of control, i.e., the electronic transferable record. It was therefore indicated that the first set of bracketed text was preferable to the second set, which was based on a circular statement by referring to the electronic transferable record itself.

26. On the other hand, it was indicated that the second set of bracketed text in draft article 10(1)(a) provided more flexibility, while explicit reference to uniqueness was not necessary given that the notion of control was sufficient to ensure singularity. It was added that a reference to the notion of uniqueness could pose not only challenges to technical implementation but also difficulties with respect to the practice of using multiple originals.

27. It was indicated that draft article 10(3)(a) did not sufficiently clarify the notion of integrity. It was explained that the notion of integrity contained in article 8 of the

UNCITRAL Model Law on Electronic Commerce, which formed the basis for draft article 10(3)(a), was appropriate for documents such as contracts that did not typically foresee a number of changes during their life cycle. It was further explained that electronic transferable records had a dynamic nature that usually entailed a number of changes during their life cycle. Hence, it was suggested that draft article 10(3)(a) should be redrafted so that the notion of integrity would be based on the ability to preserve the information contained at the time of the issuance of the electronic transferable record and any authorized change made thereafter, until the moment of termination and archival of that record.

28. In that context, a suggestion was made to revise draft article 10(3)(a) along the following lines: “the criteria for assessing integrity shall be whether [each set of] information contained in the electronic transferable record, including any [authorized] [legitimate] change that arises throughout the life cycle of the electronic transferable record, has remained complete and unaltered”. A number of observations were made with respect to that suggestion.

29. It was explained that the words “[each set of]” aimed to clarify that any set of information documenting legally relevant events during the life cycle of the electronic transferable record would need to remain complete and unaltered. In response, it was noted that reference to “any authorized change that arises throughout the life cycle of the electronic transferable record” was sufficient to address that point. After discussion, the Working Group agreed to delete the words “[each set of]”.

30. The view was expressed that there was no need to distinguish between authorized and unauthorized changes and thus the words “any change” would suffice. It was further said that reference to an “authorized change” would require specifying the entity responsible for authorization.

31. Yet another suggestion was to retain the current text of draft article 10(3)(a) with the addition of the words “authorized or technical” before the word “change”, which would capture both changes that were agreed by parties involved and changes of a technical nature. In response, it was noted that changes of a purely technical nature did not need to be mentioned in the draft provisions as they were of no legal relevance.

32. It was also suggested that a distinction should be made between authorized and legitimate changes. It was explained that authorized changes were those effected through the system established for the management of electronic transferable records while legitimate changes were those made in accordance with substantive law. It was further mentioned that the system established for the management of electronic transferable records should be designed to prevent unauthorized changes, which would protect the integrity of an electronic transferable record, and should be considered as retaining the integrity of the electronic transferable record if it kept a complete and unaltered record of all authorized changes. It was noted that an authorized change may include a change that was considered illegitimate under substantive law, for example, when the change was made using a stolen password.

33. After discussion, the Working Group agreed that draft article 10(3)(a) of Option B could read along the following lines: “the criteria for assessing integrity shall be whether information contained in the electronic transferable record, including any [authorized] change that arises throughout the life cycle of the electronic transferable record, has remained complete and unaltered”. It was further agreed that clarification should be provided with respect to the meaning of “[authorized]”, taking into consideration suggestions mentioned above (see paras. 30-32 above). Regarding how the changes of a technical nature would be treated under the draft provisions, it was agreed that guidance should be sought from article 8(3)(a) of the Model Law on Electronic Commerce and that reference to draft article 30 on retention of information in an electronic transferable record should be included in draft article 10(3)(a).

34. With respect to draft article 10(3)(b), the Working Group agreed to retain it in its current form.

35. It was suggested that functional equivalence rules in the draft provisions that included a reliability standard should be accompanied by a safeguard provision akin to article 9(3)(b)(ii) of the Electronic Communications Convention.

36. After concluding its discussion of draft article 10(3), the Working Group engaged in a general discussion on the functions performed by the “original” of a paper-based transferable document or instrument so as to identify how those functions could be achieved in an electronic environment.
37. It was indicated that the notion of “original” did not necessarily appear in national legislation. It was added that the same notion had limited relevance in international legal texts such as the Geneva Conventions.
38. In the same line, it was explained that reference to the paper-based notion of “original” was not necessary to avoid multiple claims in the context of electronic transferable records, since that goal could be achieved through the notion of “control”. It was further explained that the notion of “control” could identify both the person entitled to performance and the object of control. It was added that resorting to the notion of “control” would make it possible not to refer to the notion of “uniqueness”, which posed technical challenges.
39. In response, it was said that a functional equivalence rule for the notion of “original” was necessary, since substantive law required the original of a paper-based transferable document or instrument to request performance or provided consequences for its absence. It was added that the notion of “control” as a functional equivalent of the paper-based notion of “possession” could identify only the person entitled to claim performance, but that identification of the object of the performance demanded a functional equivalent of the paper-based notion of “original”.
40. After discussion, the Working Group agreed that there was no need to include a functional equivalence rule for “original” in the draft provisions and decided to adopt the approach taken in Option A. In that vein, the Working Group agreed to: (i) delete draft article 10 of Option A; (ii) retain draft article 11 of Option A in square brackets for further consideration in light of its discussion on “possession” and “control”; and (iii) retain draft article 12 of Option A with the modifications agreed with respect to draft article 10(3) of Option B (see para. 33 above).

#### **Draft article 11. General reliability standard (Option C)**

41. After deliberation of draft article 10 of Option B, the Working Group discussed whether a general reliability standard as provided in draft article 11 of Option C should be included in the draft provisions.
42. It was stated that the presence of a general reliability standard could hamper the use of electronic transferable records as legal consequences of failure to meet those standards were not clear. It was further stated that caution should be exercised so as not to make the draft provisions untenable in practice. It was also noted that there was no need for a general reliability standard as each draft article containing a reliability standard should include in itself a provision specific to that context.
43. While there was some support for the deletion of a general reliability standard, it was urged that the draft provisions should provide general guidance on the meaning of reliability and set out the criteria for meeting that standard. It was noted that, while party autonomy could suffice to establish reliability standards in closed systems, there was a need for the draft provisions to set out reliability standards applicable to open systems. It was further mentioned that if a general reliability standard were to be included, it should be drafted in a manner mindful of technological neutrality.
44. The Working Group continued its consideration of draft article 11 of Option C on the basis of a proposal incorporating in draft article 11(2) references to: quality of staff; sufficient financial resources and liability insurance; and existence of a notification procedure for security breaches. The proposal was drafted in prescriptive terms. It aimed at being technology-neutral and would not apply to closed systems as defined in the law or by agreement.
45. That proposal received some support. It was suggested that a reference to reliable audit trails should be added.
46. However, the view was expressed that the reliability requirements set forth in that proposal were too detailed and that the provision was regulatory in nature. It was added that

the adoption of such detailed requirements could impose excessive costs on business and ultimately hamper electronic commerce. It was further noted that those requirements could lead to increased litigation based on complex technical matters. It was suggested that a reference to reliable methods based on internationally accepted standards and practices should instead be inserted in the draft provisions.

47. In response, it was noted that loosely defined reliability requirements were more likely to foster litigation and hinder legal predictability, while the revised draft article 11(2) would increase legal certainty by better specifying the elements relevant for a general reliability standard.

48. It was expressed that draft article 11(2) did not relate to the reliable method referred to in the specific articles setting out functional equivalence rules, but was of the nature of a set of standards for third-party service providers. It was observed that the Working Group would need to consider what would be the consequence of non-compliance with those proposed standards. It was explained that the reliability requirements contained in the proposal would apply to all system providers for electronic transferable records and not only to third-party service providers. It was suggested that specific functional equivalence provisions should refer to “as reliable as appropriate” as the standard of reliability.

49. After discussion, the Working Group agreed to further consider the revised draft article 11(2) as a possible general rule on system reliability and in connection with provisions relating to third-party service providers. The Working Group also agreed to consider the adoption of specific standards for each draft provision referring to a reliable method.

#### **Draft article 15. Issuance of multiple originals**

50. With respect to the transposition of the practice of issuing multiple originals of paper-based transferable documents or instruments to an electronic environment (A/CN.9/WG.IV/WP.128/Add.1, paras. 6-7), the Working Group was informed of examples of practices of issuing multiple originals and requested the Secretariat to continue its efforts in compiling existing practices.

#### **Draft article 18. Possession**

51. It was suggested that the heading of draft article 18 should be “Control” as that would better reflect the content of that article. It was responded that draft article 18 aimed at establishing the functional equivalence of the paper-based notion of possession, and that reference to possession would conform to the headings of similar provisions such as draft articles 20 and 21.

52. It was suggested that the words “[de facto]” should be deleted from draft article 18 with the understanding that that concept would be contained in the definition of “control” in draft article 3.

53. After discussion, the Working Group agreed to retain the heading “Possession” and to delete the words “[de facto]” in draft article 18.

54. The Working Group then considered the definition of “control” as provided in draft article 3. It was recalled that the Working Group had understood control to be a matter of factual nature similar to actual possession and that three sets of square bracketed text had been prepared to reflect that notion.

55. A number of suggestions were made with respect to the three sets of square bracketed text in draft article 3. Regarding the first and second sets, it was said that defining “control” using the word “power” ran the risk of a circular definition as “control” and “power” were synonymous. Regarding the first set, it was said that the words “de facto” should not be used as they gave the impression that there could be control which was not factual. With regard to the third set, it was noted that defining “control” using the word “control” was circular and redundant.

56. The view was expressed that the definition of control should be deleted from the definitions as it was merely a statement that control was of a factual nature and was not a true definition. It was also said that the definition of control should be left to national law

and would depend on the system established for management of electronic transferable records.

57. Another view was that each draft article relating to control relied on the definition of control. It was added that if the definition of control included only reference to its factual nature and did not refer to exclusivity, difficulties could arise in understanding other relevant provisions.

58. It was recalled that the Working Group had decided to draft a definition of “control” as a number of articles made reference to “control”. It was suggested that otherwise, each draft article relating to control would need to refer to the factual nature of control.

59. There was general support that while the three sets of square bracketed text in draft article 3 might not properly constitute a definition, there was merit in illustrating the factual nature of control in the draft provisions. It was further clarified that functions of third-party service providers or intermediaries of the electronic transferable record should not be covered under the notion of “control”.

60. After discussion, the Working Group agreed to proceed with the working assumption that: (i) “control” of an electronic transferable record would mean the factual power to deal with or dispose of that electronic transferable record; and (ii) the power of the third-party service provider or the intermediary to deal with or dispose of the electronic transferable record did not constitute control. The Working Group postponed its decision on whether such a statement should be included in the draft provisions, and if included, whether it should be in the article on definitions, in specific articles referring to control or in a separate article.

61. With respect to draft article 18(2), it was recalled that it was the only provision in the draft provisions that embodied the idea that an electronic transferable record should be subject to control from the time of its issuance until it ceased to have any effect or validity. However, it was explained that an electronic transferable record need not necessarily be subject to control during its entire life cycle. It was said that that occurred, for instance, when a token-based electronic transferable record was lost. Therefore, it was suggested that that paragraph should instead indicate that an electronic transferable record was capable of being controlled during its life cycle, particularly in order to allow for its transfer. Moreover, it was stressed that such a rule could provide guidance to legislators as well as designers of the electronic transferable record management system that electronic transferable record should be capable of being subject to control. In response, it was noted that the notion of being subject to control was implicit in an electronic transferable record.

62. After discussion, the Working Group decided to revise draft article 18(2) along the following lines: “[an electronic transferable record shall be capable of [control] [being subject to control] by [a single] [one or more] person during its life cycle]”. As for its placement, it was suggested that it could be included in the definition of electronic transferable record, or in the provision on uniqueness, or in a separate article.

#### **Draft article 19. Reliability of method for establishing control**

63. It was said that Options X and Y of draft article 19 did not fully achieve the intended goal of providing guidance in assessing the reliability of the method used for establishing control in draft article 18.

64. It was suggested that draft article 18 contained a functional equivalence rule and that the related reliability standard should be drafted along the lines of draft article 9. It was explained that that approach would offer flexibility in assessing reliability in the specific contexts, and this was also desirable since too high a standard could hamper electronic commerce, while too low a standard could prove useless.

65. After discussion, the following text was suggested for consideration by the Working Group as draft article 18:

“Where the law requires the possession of a paper-based transferable document or instrument, or provides consequences for the absence of possession, that requirement is met [with respect to the use of an electronic transferable record] [through control] if:

- [(a) A method is used to establish control; and]

- (b) The method used is either:
  - (i) As reliable as appropriate for the purpose for which the electronic transferable record was created, in the light of all the relevant circumstances, including any relevant agreement; or
  - (ii) Proven in fact [to have fulfilled the functions of control] [to have been reliable], by itself or together with further evidence.”

66. With respect to that suggestion, it was mentioned that the draft provisions did not have reference to the exclusivity of control, which was essential to ensuring singularity of the claim and therefore the operation of electronic transferable records. It was added that specific reference to exclusive control might avoid the need to refer to the notion of “uniqueness”, which posed legal and technical challenges. In response, it was recalled that the Working Group had previously considered that exclusivity was implicit in the notion of control (see A/CN.9/797, para. 74).

67. Upon further consideration of the proposed revised text of draft article 18, the Working Group agreed that: (i) only the first square bracketed text in the chapeau should be retained outside square brackets; (ii) subparagraph (a) should be retained outside square brackets with the addition of the words “of that electronic transferable record” after the word “control”; (iii) subparagraph (b)(ii) should be revised to state “[p]roven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence”; and (iv) the word “created” in subparagraph (b)(i) could be substituted with the word “generated” or clarified to indicate that reliability could be assessed for the purposes of the type of electronic transferable record.

68. Thereafter, the Working Group continued its discussion on how to address exclusivity of control in the draft provisions. It was generally agreed that the draft provisions could address the exclusive nature of control explicitly, either in the definition of “control” or as a separate rule, or not address the issue explicitly.

69. The view was expressed that, similar to a paper-based transferable document or instrument, exclusivity of control over an electronic transferable record would be a logical result achieved through the uniqueness of that record. However, it was widely felt that the notion of exclusivity of control should be distinguished from the notion of uniqueness as they served different purposes and operated independently (see A/CN.9/797, paras. 48-50). For instance, it was explained that it was possible to conceive exclusive control over a non-unique record, or, conversely, non-exclusive control over a unique record. It was noted that achieving the notion of uniqueness of an electronic transferable record might be unrealistic in a registry-based system where no unique object might exist, but it might be possible to create a unique token in a token-based system. It was expressed that uniqueness should not be referred to in the draft provisions as a quality of an electronic transferable record.

70. It was stressed that the draft provisions should aim to prevent multiple claims of the same obligation. It was also noted that there could be instances where multiple parties could be entitled to performance of the obligation and therefore control did not need to be exercised by one person only.

71. The Working Group proceeded to prepare a provision, which would replace draft article 11 of Option A on uniqueness. It was suggested that that provision should offer a functional equivalence rule for the use of paper-based transferable documents or instruments by setting forth the requirements to be met by the use of an electronic record. In that context, it was suggested that the provision should refer to “one or more than one” electronic record or refer to “authoritative information” to illustrate that there might, in certain registry systems, be data elements in the system that, taken together, provided the information constituting the electronic transferable record, but with no discrete record constituting the electronic transferable record. In response, it was mentioned that the current definition of “electronic record” in draft article 3, which contained the word “information”, was sufficiently broad to cover that possibility.

72. Furthermore, it was suggested that a reliable method should be employed to identify an electronic record as the authoritative or operative electronic record to be used as the electronic transferable record. With respect to that suggestion, it was pointed out that an

“electronic transferable record” was by definition authoritative or operative and thus those qualities need not be mentioned. While it was also suggested that a reliable method should be employed to render an authoritative or operative electronic record distinguishable from other records containing the same information, it was generally viewed that such a provision was redundant.

73. A further suggestion was that a reliable method should be employed to prevent unauthorized replication of the electronic transferable record. It was further suggested that a reliable method should be employed to also retain the integrity of the electronic transferable record. Another suggestion was that a reliable method should be employed to render the electronic record capable of being subject to control during its life cycle, as had been discussed in the context of draft article 18(2) (see paras. 61-62 above).

74. After discussion, the Working Group agreed to delete article 11 of Option A on uniqueness, which it had put in square brackets (see para. 40 above) and to introduce a new draft article along the following lines:

“Draft article \*\*. [Operative electronic record] [Paper-based transferable document or instrument]

1. Where the law requires the use of a paper-based transferable document or instrument or provides consequences for its absence, that requirement is met by the use of [an] [one or more than one] electronic record if a reliable method is employed:

(a) To identify that electronic record as the [operative] electronic record to be used as an electronic transferable record and to prevent the unauthorized replication of that electronic transferable record;

(b) To render that electronic record capable of being subject to control during its life cycle; and

(c) To retain the integrity of the electronic transferable record.

2. A method shall satisfy paragraph 1, if ...”

75. With respect to paragraph 2 of the above-mentioned draft article, it was suggested that the revised draft article 12 of Option A could provide guidance for the reliability standard relating to subparagraph (c). The Secretariat was requested to provide similar text relating to subparagraphs (a) and (b). As to the placement of the draft article, it was suggested that that draft article should be placed closer to the draft article on control and thus in Section C.

#### **Draft article 20. Delivery**

76. The Working Group agreed to retain draft article 20 in its current form.

#### **Draft article 21. Presentation**

77. It was said that draft article 21 did not fully capture the functions of presentation, and therefore did not provide an adequate functional equivalence rule on presentation. It was indicated that further elements needed to be included in addition to demonstration of control, such as the intention to present the electronic transferable record. It was also suggested that the draft article should state that the person “required to present” must demonstrate that it has control.

78. In that connection, it was noted that in a paper-based environment, presentation could mean presentation for performance as well as for other purposes, such as presentation of a bill of exchange for acceptance. It was recalled that the draft provisions also referred to presentation in draft articles 26 and 27. In light of such variety in meanings, it was stressed that a careful analysis of all the functions fulfilled by presentation of a paper-based transferable document or instrument was necessary.

79. The Working Group agreed to retain draft article 21 in square brackets, for consideration after clarifying the possible meanings and functions of presentation.

**Draft article 22. Endorsement**

80. It was recalled that in a paper-based environment, one peculiar feature of endorsement was its placement on the back of the document or of the instrument or on a slip of paper attached thereto (“allonge”) (see A/CN.9/797, para. 95). Hence, it was suggested that draft article 22 should contain a reference to those modalities of endorsement. In response, it was noted that while national laws contained a wide range of formal prescriptions for endorsement in a paper-based environment, the draft article aimed to achieve functional equivalence of the notion of endorsement regardless of those requirements. It was added that other functional equivalence rules in the draft provisions did not refer to specific paper-based form requirements and that referring to certain form requirements but not others might be interpreted as excluding those other requirements from the scope of the draft article, thus ultimately frustrating its purpose. After discussion, the Working Group agreed to insert the words “in any form” after the first occurrence of the word “endorsement” in draft article 22.

81. It was explained that the words “[or permits]” aimed to capture cases where the law did not require endorsement but allowed it. The Working Group agreed that the draft article should be revised to address such instances in a manner consistent with other draft articles. The Working Group also agreed to retain the words “the endorsement” outside square brackets and to delete the words “[the intention to endorse]” as the former was clearer. With respect to the second set of bracketed text, the view was expressed that the words “logically associated or otherwise linked to” were technically more accurate and should be retained. However, the view was also expressed that the two options contained in that set were not mutually exclusive and thus should be retained jointly.

**Draft article 23. Transfer of an electronic transferable record**

82. With respect to draft article 23, it was recalled that paragraphs 1 and 2 were intended to serve different purposes. In particular, paragraph 1 was included to convey that transferring control of the electronic transferable record was necessary in order to transfer that record. In that respect, it was suggested that paragraph 1 could be deleted as draft articles on possession, delivery and endorsement were sufficient.

83. It was explained that the goal of paragraph 2 was to facilitate a change in the modalities of circulation of electronic transferable records when permitted by substantive law.

84. In that context, the concern was raised that it would be inappropriate for the draft provisions to refer to the term “holder”, which had legal implications under the substantive law, in spite of the qualified definition of that term in draft article 3 to a “person in control”.

85. After discussion, it was agreed that paragraph 1 should be deleted and that the word “holder” should be replaced with the words “person in control” throughout the draft provisions.

**Draft article 24. Amendment of an electronic transferable record**

86. The Working Group agreed that a rule on a reliable method to record legally relevant changes to the information contained in an electronic transferable record should be inserted, in square brackets, in the draft provisions for consideration at a future session.

**V. Technical assistance and coordination**

87. The Working Group was informed of developments in the legal framework for electronic communications in Colombia, which was based on UNCITRAL texts. Various achievements in the implementation of that legal framework were illustrated. Reference was made to the insertion of provisions relating to electronic commerce law in free trade agreements.

88. The Working Group also heard a presentation by a representative of the European Commission on the draft Regulation on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market (e-IDAS), which dealt with mutual recognition of electronic identification and electronic trust services (e-signature, e-seals, time stamping, e-delivery, e-document and website authentication) in the European Union.



89. The Working Group noted that several aspects of the draft Regulation, for example, electronic signatures, time stamping services and reliability standards, were relevant for its current work. The importance of coordination between regional and global legislation in this field critical to the development of cross-border electronic commerce was stressed.

90. After discussion, the Working Group asked the Secretariat to continue compiling information relating to identity management, authentication, trust services and other areas relevant to its current work, such as single window systems or mobile payments, including by organizing or participating in workshops, colloquia and other similar events, subject to availability of resources. It was reminded that the extension of the mandate of the Working Group to other topics discussed in document A/CN.9/728 and Add.1 as discrete subjects (as opposed to their incidental relation to electronic transferable records) would need to be further considered at a future Commission's session (A/66/17, para. 239).

91. The Working Group heard a report on the progress made at the "Ad hoc Intergovernmental Meeting on a Regional Arrangement for the Facilitation of Cross-border Paperless Trade" (Bangkok, 22-24 April 2014). The potential relevance of that draft arrangement for the promotion of the adoption of UNCITRAL texts on electronic commerce was highlighted.

## E. Note by the Secretariat on draft provisions on electronic transferable records

(A/CN.9/WG.IV/WP.128 and Add.1)

[Original: English]

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## I. Introduction

1. At its forty-fourth session, in 2011, the Commission mandated the Working Group to undertake work in the field of electronic transferable records.<sup>1</sup>
2. At its forty-sixth session (Vienna, 29 October-2 November 2012), broad support was expressed by the Working Group for the preparation of draft provisions on electronic transferable records, to be presented in the form of a model law without prejudice to the decision on the form of its work to be made by the Working Group (A/CN.9/761, paras. 90-93).
3. At its forty-seventh session (New York, 13-17 May 2013), the Working Group began reviewing the draft provisions on electronic transferable records as provided in document A/CN.9/WG.IV/WP.122 and noted that while it was premature to start a discussion on the final form of work, the draft provisions were largely compatible with different outcomes that could be achieved.
4. At its forty-eighth session (Vienna, 9-13 December 2013), the Working Group continued its consideration of the draft provisions as provided in A/CN.9/WG.IV/WP.124 and Add.1. Part II of this note contains the draft provisions reflecting the deliberations and decisions of the Working Group during that session (A/CN.9/797, paras. 16-114).

## II. Draft provisions on electronic transferable records

### A. General

#### *“Draft article 1. Scope of application*

- “1. This Law applies to electronic transferable records.
- “2. Nothing in this Law affects the application of any rule of law governing a paper-based transferable document or instrument to an electronic transferable record other than as provided for in this Law.
- “[3. This Law applies to electronic transferable records other than as provided by [law governing a certain type of electronic transferable record to be specified by the enacting State].]”

#### **Remarks**

5. Draft article 1 reflects the Working Group’s deliberations at its forty-eighth session (A/CN.9/797, paras. 16-17).

<sup>1</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 238.

6. Draft article 1, paragraph 3, is placed in square brackets as it would only be applicable in States that have enacted legislation on electronic transferable records that exist only in an electronic environment. In such case, paragraph 3 aims at allowing the application of the draft provisions also to those electronic transferable records, without interfering with their substantive law. Hence, this paragraph would not be necessary in jurisdictions where no such electronic transferable record exists. The Working Group agreed that a decision on paragraph 3 could only be made in light of the final form of the draft provisions, which has not yet been determined (A/CN.9/797, para. 17).

***“Draft article 2. Exclusion***

- “1. This Law does not override any rule of law applicable to consumer protection.
- “2. This Law does not apply to securities, such as shares and bonds, and other investment instruments.
- “3 [This Law does not apply to bills of exchange, promissory notes and cheques.]”

**Remarks**

7. Draft article 2 reflects the Working Group’s deliberations at its forty-eighth session (A/CN.9/797, paras. 18-20). The term “investment instrument” is understood to include derivative instruments, money market instruments and any other financial product available for investment (A/CN.9/797, para. 19).

8. As a reference, the Working Group may wish to compare the language used in the Regulation (EC) No 864/2007 of the European Parliament (“Rome II Regulation”),<sup>2</sup> to exclude from the application of the Rome II Regulation “non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character”. Therefore, it is understood that “other transferable documents, such as investment securities and loans”<sup>3</sup> fall within the scope of the Rome II Regulation. However, the ultimate result may depend on domestic law, as, for instance, in certain jurisdictions shares and bonds are considered negotiable instruments and would therefore be excluded from the scope of the Rome II Regulation.

9. Paragraph 3 reflects the view that, if the final form of the draft provisions were a treaty, certain paper-based transferable documents or instruments should be excluded from its scope of application in order to avoid conflicts with other treaties such as the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 1931) (the “Geneva Conventions”) (A/CN.9/797, paras. 20, 109-112; see also A/CN.9/WG.IV/WP.125).

10. Moreover, if the final form of the draft provision were a model law, the Working Group may wish to consider whether paragraph 3 should be retained to provide guidance to those jurisdictions that are parties to the Geneva Conventions as well as any other relevant conventions when they wish to enact that model law.

***“Draft article 3. Definitions***

“For the purposes of this Law:

**Remarks**

11. The definitions in draft article 3 have been prepared as a reference and should be examined in the context of the relevant draft articles. The terms are presented in the order they appear throughout the draft provisions (A/CN.9/768, para. 34). Remarks for consideration by the Working Group have been placed after each definition.

<sup>2</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (“Rome II Regulation”), Official Journal L 199, 31/7/2007, P. 40-49.

<sup>3</sup> See Philip R. Wood, Conflict of Laws and International Finance (The Law and Practice of International Finance, Vol. 6), 2007, sub 11-043.

12. In addition to the remarks below, the Working Group may wish to clarify in draft article 3 that a “person” may either be a natural or a legal person.

*“electronic transferable record”* means [an electronic record] that entitles the holder to claim the performance of the obligation [indicated] in the record and that is capable of transferring the right to performance of the obligation [indicated] in the record through the transfer of that record.

[*“paper-based transferable document or instrument”* means a transferable document or instrument issued on paper that entitles the holder to claim the performance of the obligation [indicated] in the document or instrument and that is capable of transferring the right to performance of the obligation [indicated] in the document or instrument through the transfer of that document or instrument.]

[Paper-based transferable documents or instruments include bills of exchange, cheques, promissory notes, [consignment notes,] bills of lading and warehouse receipts.]

### Remarks

13. The definitions of “electronic transferable record” and “paper-based transferable document or instrument” reflect the Working Group’s deliberations at its forty-eighth session (A/CN.9/797, paras. 21-28). These definitions do not aim at affecting the fact that substantive law shall determine whether the holder is the rightful holder and the substantive rights of the holder.

14. The Working Group confirmed that certain documents or instruments, which are generally transferable, but whose transferability is limited due to other agreements, such as straight bills of lading, would not fall under either of these two definitions, and that the draft provisions should only focus on “transferable” documents (A/CN.9/797, para. 27-28).

15. The Working Group may wish to consider whether the term “[indicated]” in square brackets in both definitions is appropriate or whether other terms might be used such as “incorporated”, “specified” or “contained” (A/CN.9/797, para. 22).

16. The Working Group may wish to refer to the definition of “electronic record” when considering the definition of “electronic transferable record”.

17. The Working Group may wish to consider deleting the definition of paper-based transferable document or instrument as it deals with substantive law matters.

18. The Working Group may wish to consider whether the indicative list of paper-based transferable documents or instruments, along the lines contained in article 2, paragraph 2, of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (the “Electronic Communications Convention”), should be included in the definition of “paper-based transferable document or instrument” or in explanatory material (A/CN.9/768, para. 34 and A/CN.9/797, paras. 25 and 26). The Working Group may also wish to consider whether to retain the reference to consignment notes, which are not transferable in certain jurisdictions.

*“electronic record”* means information generated, communicated, received or stored by electronic means[, including, where appropriate, all information logically associated or otherwise linked [together] [thereto] [so as to become part of the record], whether generated contemporaneously or [not] [subsequently].

### Remarks

19. The definition of “electronic record” is based on the definition of “data message” contained in the UNCITRAL Model Law on Electronic Commerce, 1996, and in the Electronic Communications Convention, yet highlighting the fact that other information might be associated with the electronic transferable record at the time of issuance or thereafter (e.g., information related to endorsement) (A/CN.9/797, paras. 43-45). The bracketed text is meant to clarify that some electronic records could, but do not need to, include a set of composite information (A/CN.9/797, para. 43).

“*issuer*” means a person that issues [directly, or with the assistance of a third party,] an electronic transferable record [on its own behalf].

**Remarks**

20. The Working Group may wish to consider whether to retain the definition of “*issuer*” in light of the deletion of a draft provision on issuance (A/CN.9/797, paras. 64-67).

21. If the definition of “*issuer*” is retained, the Working Group may wish to consider whether it should add to that definition the words [directly, or with the assistance of a third party], which aim at clarifying that when an electronic transferable record is issued by a third party upon the issuer’s request, the third party is not considered an issuer under the draft provisions.

“*control*” of an electronic transferable record means the [de facto power to deal with or dispose of that electronic transferable record] [power to factually deal with or dispose of the electronic transferable record] [control in fact of the electronic transferable record].

**Remarks**

22. The Working Group suggested that a definition of “*control*” could be added (A/CN.9/797, para. 83).

“*holder*” of an electronic transferable record is a person in control of the electronic transferable record [in accordance with article 18].

**Remarks**

23. The Working Group may wish to consider whether the definition of holder accurately reflects the Working Group’s conclusion (A/CN.9/768, para. 86) and clarifies that a holder of an electronic transferable record would need to have only control of the electronic transferable record to be considered a holder. Whether the person in control is the rightful holder and the substantive rights of the holder are matters for the substantive law (A/CN.9/WG.IV/WP.122, paras. 29 and 31).

24. The Working Group may wish to consider whether the words [in accordance with article 18] should be deleted to capture instances in which the holder did not receive control from a transferor, e.g., in case of theft of an electronic transferable record.

“*transfer*” of an electronic transferable record means the transfer of control over an electronic transferable record.

**Remarks**

25. The Working Group may wish to consider whether to retain this definition in light of draft article 23 on transfer.

“*amendment*” means the modification of information contained in the electronic transferable record in accordance with the procedure set out in draft article 24.

**Remarks**

26. The Working Group may wish to consider whether to retain this definition in light of draft article 24 on amendment and the remarks to that draft article.

“*performance of obligation*” means the delivery of goods or the payment of a sum of money as specified in a paper-based transferable document or instrument or an electronic transferable record.

**Remarks**

27. The Working Group may wish to consider whether to retain this definition, which refers generally to the delivery of goods or the payment of a sum of money as mentioned in article 2, paragraph 2, of the Electronic Communications Convention (A/CN.9/761, para. 22).

“*obligor*” means the person specified in a paper-based transferable document or instrument or an electronic transferable record who has the obligation to perform.

### Remarks

28. The Working Group may wish to consider whether the definition of “obligor” should be retained in light of the fact that that notion may be defined under substantive law. In case of retention of that definition, the Working Group may wish to further clarify in the definition that substantive law would address who the obligor is.

“*replacement*” means substitution of a paper-based transferable document or instrument with an electronic transferable record or [vice versa] [conversely].

### Remarks

29. The Working Group may wish to consider whether the definition should be limited to instances where there is change only in the medium in accordance with the procedure set out in draft article 26 or whether it should be broadened to include instances where an electronic transferable record was issued to substitute for another electronic transferable record (see A/CN.9/WG.IV/WP.124/Add.1, para. 27).

“*third-party service provider*” means a third party providing services related to [the use of] electronic transferable records in accordance with articles 31 and 32.”

30. The Working Group may wish to consider whether the words [the use of] should be deleted to ensure consistency with the definition of “certificate service provider” contained in article 2(e) of the UNCITRAL Model Law on Electronic Signatures (2001).

### “Draft article 4. Interpretation

“1. This Law is derived from [...] of international origin. In the interpretation of this Law, regard is to be had to the international origin and to the need to promote uniformity in its application [and the observance of good faith].

“2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.”

### Remarks

31. Draft article 4 is intended to draw the attention of courts and other authorities to the fact that the draft provisions should be interpreted with reference to their international origin in order to facilitate their uniform interpretation (A/CN.9/768, para. 35). The square bracketed text in paragraph 1 would depend on the final form of the draft provisions and the paragraph itself would need to be revised accordingly.

32. While the term “general principles” in paragraph 2 has been used in several UNCITRAL texts, article 7 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (“CISG”) is the provision containing that term that has been most interpreted by case law.

33. The UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2012) lists several general principles relevant to article 7 of the CISG according to case law, including: party autonomy; estoppel; place of payment of monetary obligations; mitigation of damages; and *favor contractus*. Those general principles are contained in specific provisions of the CISG and applied in other cases falling under the scope of the CISG.

34. However, not all the general principles that have been identified in the CISG gather the same level of support in being recognized as such. Moreover, determination of the content and operation of those general principles takes place progressively. Such progressive determination assists in ensuring flexibility in interpreting the CISG and adapting it to evolving commercial practices and business needs.

35. The notion of “general principles” contained in draft article 4 paragraph 2 refers to the general principles of electronic transactions (A/CN.9/797, para. 29), including those already stated in relevant UNCITRAL texts. In this line, the Working Group may wish to confirm

that the three fundamental principles of non-discrimination of electronic communications, technological neutrality and functional equivalence should be considered as general principles underlying the draft provisions. Some of the general principles underlying the CISG, such as party autonomy and good faith, may also be relevant. In that respect, the Working Group may wish to consider whether a reference to good faith should be retained in the context of the draft provisions also in light of the fact that it is contained in other UNCITRAL texts on electronic commerce. Other general principles might be identified as the work of the Working Group makes progress.

***“Draft article 5. Party autonomy [and privity of contract]”***

“1. The parties may derogate from or vary by agreement the provisions of this Law [except articles 6, 7 and ... ]

“2. Such an agreement does not affect the rights of any person that is not a party to that agreement.”

**Remarks**

36. The Working Group highlighted the importance of party autonomy in the draft provisions (A/CN.9/797, para. 30) and, based on the general applicability of that principle, agreed to identify which draft articles could not be derogated from (A/CN.9/797, para. 32). It is suggested that such identification should be carried out at a later stage of preparation of the draft provisions, pending, in particular, discussion on the provisions relating to third-party service providers.

***“Draft article 6. Information requirements”***

“Nothing in this Law affects the application of any rule of law that may require a person to disclose its identity, place of business or other information, or relieves a person from the legal consequences of making inaccurate, incomplete or false statements in that regard.”

37. The Working Group decided to retain draft article 6 with the understanding that it reminds parties of the need to comply with possible disclosure obligations that might exist under other law (A/CN.9/797, para. 33).

**B. Provisions on electronic transactions**

***“Draft article 7. Legal recognition of an electronic transferable record”***

“An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form.”

***“Draft article 8. Writing”***

“Where the law requires that information should be in writing or provides consequences for the absence of a writing, that requirement is met with respect to the use of an electronic transferable record if the information contained in the electronic transferable record is accessible so as to be usable for subsequent reference.”

**Remarks**

38. Draft article 8 reflects the Working Group’s deliberations at its forty-eighth session (A/CN.9/797, paras. 36-39).

39. The Working Group may wish to confirm that the words “information contained therein” refer to the information contained in an electronic transferable record, and that general electronic transactions law would establish functional equivalence for writing requirements when the information is not contained in the electronic transferable record.

***“Draft article 9. Signature***

“Where the law requires a signature of a person or provides consequences for the absence of a signature, that requirement is met with respect to the use of an electronic transferable record if:

- (a) A method is used to identify that person and to indicate that person’s intention in respect of the information contained in the electronic transferable record; and
- (b) The method used is either:
  - (i) As reliable as appropriate for the purpose for which the electronic record was generated, in the light of all the relevant circumstances, including any relevant agreement; or
  - (ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.”

**Remarks**

- 40. Draft article 9 reflects the Working Group’s deliberations at its forty-eighth session (A/CN.9/797, paras. 40-46).
- 41. The Working Group may wish to consider draft article 9 in conjunction with the revised definition of the term “electronic record” contained in draft article 3.

**Draft articles on original, uniqueness and integrity**

- 42. At the forty-eighth session of the Working Group, it was noted that the notion of “original” in the context of electronic transferable records was different from that adopted in other UNCITRAL texts (A/CN.9/797, para. 47).
- 43. With respect to the notion of uniqueness, at that session support was expressed for the view that uniqueness was not a general requirement for electronic transferable records and that in practice, it could be very difficult to achieve uniqueness in an electronic environment. In that line, uniqueness should not be perceived as a quality on its own and emphasis should rather be on the function that uniqueness achieves, namely, prevention of multiple claims. Various methods to replicate that function existed in an electronic environment that did not necessarily require uniqueness. In some cases, the notion of control could suffice to prevent the risk of exposing the debtor (obligor) to multiple requests for performance (A/CN.9/797, paras. 48 and 50).
- 44. The following options reflect the discussion by the Working Group at its forty-eighth session on the possible formulations of the draft articles on original, uniqueness and integrity (A/CN.9/797, paras. 58-59).

**Option A*****“Draft article 10. Original***

“Where the law requires [the original of] a paper-based transferable document or instrument, or provides consequences for [the absence of the original] [its absence], that requirement is met with respect to the use of an electronic transferable record if a reliable method is employed:

- (a) [to render the electronic transferable record unique, or to identify the electronic transferable record as containing the authoritative information constituting the electronic transferable record] [to render the electronic transferable record identifiable as such and to prevent its unauthorized replication] [in accordance with draft article 11]; and
- (b) to retain the integrity of the electronic transferable record [from the time of its issuance, apart from the additions of any change that arises throughout the life cycle of the electronic transferable record] [in accordance with draft article 12].”

***“Draft article 11. Uniqueness of an electronic transferable record***



“1. A reliable method shall be employed [to render the electronic transferable record unique, or to identify the electronic transferable record as containing the authoritative information constituting the electronic transferable record] [to render the electronic transferable record identifiable as such and to prevent its unauthorized replication].

“2. A method satisfies paragraph 1, if it:

(a) Designates an authoritative copy of an electronic transferable record, which is readily identifiable as such; and

(b) Ensures that the authoritative copy of an electronic transferable record cannot be reproduced.”

“3. For the purposes of paragraph 1, the standard of reliability required shall be assessed in the light of the purpose for which the information contained in the electronic transferable record was generated and in the light of all the relevant circumstances.”

***“Draft article 12. Integrity of an electronic transferable record***

“1. A reliable method shall be employed to retain the integrity of an electronic transferable record from its issuance.

“2. For the purposes of paragraph 1:

(a) The criteria for assessing integrity shall be whether the information contained in the electronic transferable record has remained complete and unaltered, apart from the addition of any change that arises throughout the life cycle of the electronic transferable record; and

(b) The standard of reliability required shall be assessed in the light of the purpose for which the information contained in the electronic transferable record was generated and in the light of all the relevant circumstances.”

**Remarks**

45. Under option A, draft article 10 aims at establishing a rule on functional equivalence between electronic transferable records and the original of a paper-based transferable document or instrument (A/CN.9/797, paras. 47 and 52; see also A/CN.9/768, paras. 49 and 50).

46. Draft article 10 aims at providing a functional equivalence of the notion of “original” specific to electronic transferable records by incorporating the elements of integrity and uniqueness. The Working Group may wish to consider whether draft articles 11 and 12 should also be retained, and in what form.

47. The wording of draft article 10 departs from that of article 8 of the Model Law on Electronic Commerce and article 9 of the Electronic Communications Convention because of the different notion of “original” in the context of electronic transferable records (see para. 42 above).

48. The Working Group may wish to consider whether reference to “the original of” is necessary in draft article 10, paragraph 1, in light of the possible lack of reference to “original” in the substantive law (A/CN.9/797, paras. 53-55).

49. The words [from the time of its issuance, apart from the additions of any change that arises throughout the life cycle of the electronic transferable record] have been added as a possible drafting suggestion to better capture the notion of “original” as applied to a paper-based transferable document or instrument. The Working Group may wish to further discuss the matter also in relation with the notion of “integrity”.

50. The second set of bracketed text in draft article 10(a) aims at addressing a concern on the technical implementation of the notion of uniqueness (A/CN.9/797, para. 57).

51. The words [prevent unauthorized replication of an electronic transferable record] have been added as a drafting option in draft article 11 to reflect the function of uniqueness, which is preventing unauthorized replication of the electronic transferable record, rather than the notion of uniqueness per se. This approach might be preferable in light of the fact that certain

systems, such as those registry-based, may not need a method to achieve uniqueness but can prevent unauthorized replication otherwise (A/CN.9/797, para. 50).

52. The Working Group may wish to discuss the relation between the notions of “copy”, “replication” and “reproduction”.

53. The Working Group at its forty-eighth session decided to retain draft articles 7-10 as a separate section (A/CN.9/797, para. 34). The Working Group may wish to review its decision in light of the final form of the draft provisions as well as the content of draft articles 10, 11 and 12.

### **Option B**

#### ***“Draft article 10. Original***

“1. Where the law requires [the original of] a paper-based transferable document or instrument, or provides consequences for [the absence of the original] [its absence], that requirement is met with respect to the use of an electronic transferable record if a reliable method is employed:

(a) [to render the electronic transferable record unique, or to identify the electronic transferable record as containing the authoritative information constituting the electronic transferable record] [to render the electronic transferable record identifiable as such and to prevent its unauthorized replication]; and

(b) to retain the integrity of the electronic transferable record.

“2. For the purposes of subparagraph 1(a), the criteria for assessing uniqueness shall be:

(a) whether the electronic transferable record is identified as containing the authoritative information constituting the electronic transferable record; and

(b) whether its unauthorized replication is prevented.

“3. For the purposes of subparagraph 1(b):

(a) The criteria for assessing integrity shall be whether the information contained in the electronic transferable record has remained complete and unaltered, apart from the addition of any change that arises throughout the life cycle of the electronic transferable record; and

(b) The standard of reliability required for integrity shall be assessed in the light of the purpose for which the information contained in the electronic transferable record was generated and in the light of all the relevant circumstances.”

54. Draft article 10 of Option B provides a functional equivalence rule for the “original” requirement with the notions of uniqueness and integrity supporting such a rule (A/CN.9/797, para. 58). Under Option B, draft articles 10, 11 and 12 of Option A would be merged (A/CN.9/797, para. 58). The Working Group may wish to refer to paragraphs 45-53 above when considering Option B.

55. The Working Group may wish to consider introducing the provision contained in draft article 11, paragraph 2 of Option A in draft article 10 of Option B.

### **Option C**

#### ***“Draft article 10. Original***

“Where the law requires [the original of] a paper-based transferable document or instrument, or provides consequences for the absence [of the original] [its absence], that requirement is met with respect to the use of an electronic transferable record if a reliable method is employed:

(a) [to render the electronic transferable record unique, or to identify the electronic transferable record as containing the authoritative information constituting the electronic transferable record] [to render the electronic transferable record identifiable as such and to prevent its unauthorized replication]; and

(b) to retain the integrity of the electronic transferable record [from the time of its issuance, apart from the additions of any change that arises throughout the life cycle of the electronic transferable record].”

**“Draft article 11. General reliability standard**

“1. In determining reliability for the purposes of [articles 10, 18, 24, 27, 28 and 29 and ...] regard shall be had to the extent to which the method employed is able to ensure data integrity and to prevent unauthorized access to and use of the [system] [method].

“2. In determining whether, or to what extent, a method is reliable for the purposes of [articles 10, 18, 24, 27, 28 and 29 and ...], regard may be had to the following factors:

- (a) Level of assurance of data integrity;
- (b) Ability to prevent unauthorized access to and use of the system;
- (c) Quality of hardware and software systems;
- (d) Regularity and extent of audit by an independent body;
- (e) The existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method; or
- (f) Any other relevant factor.”

**Remarks**

56. A third drafting suggestion was to recast draft articles 10, 11 and 12 as two draft articles, one providing a functional equivalence rule for “original” and another providing the reliability test for uniqueness and integrity (A/CN.9/797, para. 59). The Working Group may wish to refer to paragraphs 45-50 and 53 above when considering Option C.

57. Draft article 11 aims to offer guidance on possible elements to be considered when assessing reliability of a method used during the life cycle of an electronic transferable record. The Working Group may wish to consider draft article 11 in conjunction with draft article 19, dealing with reliability of method of control. The Working Group may also wish to consider deleting the words [articles 10, 18, 24, 27, 28 and 29 and ...] so as to provide a general reliability test that could be added to the draft provisions.

58. Draft article 11, paragraph 2 is inspired by article 10 of the UNCITRAL Model Law on Electronic Signatures, which provides guidance on how to assess trustworthiness of systems, procedures and human resources used by a certification service provider (A/CN.9/797, para. 89).

## (A/CN.9/WG.IV/WP.128/Add.1) (Original: English)

## Note by the Secretariat on draft provisions on electronic transferable records

## ADDENDUM

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**II. Draft provisions on electronic transferable records (*continued*)****C. Use of electronic transferable records*****“Draft article 13. Time and place of dispatch and receipt of electronic transferable records***

“1. The time of dispatch of an electronic transferable record is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic transferable record has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic transferable record is received.

“2. The time of receipt of an electronic transferable record is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic transferable record at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic transferable record has been sent to that address. An electronic transferable record is presumed to be capable of being retrieved by the addressee when it reaches the addressee’s electronic address.

“3. An electronic transferable record is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business.

“4. Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic transferable record is deemed to be received under paragraph 3 of this article.”

**Remarks**

1. At the Working Group’s forty-eighth session, it was suggested that a provision on time and place of dispatch and receipt of electronic transferable records, based on article 10 of the Electronic Communications Convention, should be added to the draft provisions (A/CN.9/797, para. 61).

2. The Working Group may wish to consider whether draft article 13, based on a provision designed for the exchange of electronic communications, could adequately provide for electronic transferable records. In particular, the Working Group may wish to clarify its operation in registry systems, which may be considered as a single information system, but where an electronic transferable record might circulate without being sent to or received at an electronic address. Moreover, substantive law on registry-based systems might contain a rule with respect to third parties based on the availability of information in that system, regardless of that information being communicated (see Recommendation 70 of the UNCITRAL Legislative Guide on Secured Transactions (2007)).

3. In the same line, the Working Group may wish to consider the applicability of the draft article to instances when the electronic transferable record, for example in a token-based system, may be transferred by transmission of its storage medium (e.g., USB key or smart card).

4. The Working Group may further wish to consider defining the terms “originator”, “addressee” and “electronic address”. In this respect, for instance, the Working Group may wish to discuss the relationship between “originator”, “issuer”, and “transferor” (see also A/CN.9/768, paras. 68-69).

***“Draft article 14. Consent to use an electronic transferable record***

“1. Nothing in this Law requires a person to use an electronic transferable record without its consent.

“2. The consent of a person to use an electronic transferable record may be inferred from the person’s conduct.”

**Remarks**

5. Draft article 14 reflects the Working Group’s deliberations at its forty-eighth session (A/CN.9/797, paras. 62-63).

***“Draft article 15. Issuance of multiple originals***

“Where the law permits the issuance of more than one original of a paper-based transferable document or instrument, this may be achieved with respect to the use of electronic transferable records by ...”]

**Remarks**

6. Draft article 15 reflects the Working Group’s deliberations at its forty-eighth session (A/CN.9/797, paras. 47 and 68). The Working Group may wish to consider whether this draft article should be retained or if the functions performed by multiple originals in a paper-based environment may be achieved otherwise in an electronic environment.

7. Draft articles 15 and 16 are the only provisions dealing with the issuance of electronic transferable records in the draft provisions (A/CN.9/797, paras. 64-69). With respect to the possibility of issuing an electronic transferable record to bearer, draft article 1, paragraph 2 would facilitate such issuance (A/CN.9/797, para. 65).

***“Draft article 16. Substantive information requirements of electronic transferable records***

“Nothing in this Law requires additional information for the issuance of an electronic transferable record beyond that required for the issuance of a paper-based transferable document or instrument.”

**Remarks**

8. Draft article 16 reflects a decision of the Working Group at its forty-eighth session (A/CN.9/797, para. 73). It states that no additional substantive information is required for the issuance of an electronic transferable record, if that information is not required for a corresponding paper-based transferable document or instrument.

9. The Working Group may wish to clarify that the information requirement contained in draft article 26(1)(b) (and set forth with respect to paper-based documents or instruments in draft article 26(2)(b)) does not represent an exception to this rule, as those provisions aim at ensuring the perduring availability of information in case of change of medium.

***“Draft article 17. Additional information in electronic transferable records***

“Nothing in this Law precludes the inclusion of information in an electronic transferable record in addition to that contained in a paper-based transferable document or instrument.”

**Remarks**

10. Draft article 17 states that throughout its life cycle, an electronic transferable record may contain information in addition to that contained in a paper-based transferable document or instrument due to the dynamic nature of electronic transferable records (A/CN.9/768, para. 66 and A/CN.9/797, para. 73).

***“Draft article 18. Possession***

“1. Where the law requires the possession of a paper-based transferable document or instrument, or provides consequences for the absence of possession, that requirement is met through the [de facto] control of an electronic transferable record, which shall be established by a reliable method.

“2. An electronic transferable record is subject to control from the time of its issuance until it ceases to have any effect or validity.”

**Remarks**

11. Draft article 18 reflects the Working Group’s deliberations at its forty-eighth session (A/CN.9/797, para. 83).

12. The Working Group may wish to consider deleting the words [de facto] in light of the definition of “control” contained in draft article 3 (A/CN.9/797, para. 83).

13. Paragraph 2 has been added to introduce the requirement that control be exercised throughout the life cycle of the electronic transferable record. The Working Group may wish to consider whether the words [from the time of its issuance] should be inserted in paragraph 2 in light of the fact that the draft provisions do not contain a separate provision on issuance.

**Draft article 19. Reliability of method for establishing control**

14. At the forty-eighth session of the Working Group, three options were suggested with respect to the reliability of the method establishing control (A/CN.9/797, paras. 85-90): (i) a “safe harbour” rule (“Option X”); (ii) a rule containing mandatory minimum requirements for establishing reliability (“Option Y”); and (iii) a rule offering guidance on elements to be considered when assessing reliability.

15. With respect to the rule offering guidance on elements to be considered when assessing reliability, the Working Group may wish to consider the adoption of a general rule on reliability such as the one contained in draft article 11 of Option C (A/CN.9/WG.IV/WP.128, paras. 56-58).

16. In making its deliberations, the Working Group may wish to refer to the definitions of “control” and “holder” contained in draft article 3.

***“Option X***

“A method satisfies draft article 18, and a person is deemed to have control of an electronic transferable record, if the electronic transferable record is issued and transferred in such a manner that:

(a) The uniqueness and integrity of the electronic transferable record are preserved in accordance with draft articles [11 and 12 of Option A];

(b) The electronic transferable record identifies the person [asserting control] [who, directly or indirectly, has [de facto] control over the record]; and

(c) The electronic transferable record is maintained by the person asserting control.”

**Remarks**

17. Option X of draft article 19 aims at providing a safe harbour provision on the reliability of the method used to establish control over an electronic transferable record.

18. Subparagraph (b) of Option X offers alternative language to refer to the person in control (A/CN.9/797, para. 90; see also A/CN.9/WG.IV/WP.124/Add.1, para. 6).

*“Option Y*

“For the purposes of draft articles [11 and 12 of Option A and 18], a method is reliable when it prevents unauthorized access and use and ensures [data] integrity [of the electronic transferable record].”

**Remarks**

19. Option Y of draft article 19 aims at setting forth mandatory minimum requirements of a reliable method. In doing so, that draft provision may provide general guidance on the interpretation of the notion of “reliable method”.

20. The Working Group may wish to discuss whether Option Y should explicitly refer to unauthorized access and use of the system or of the method. The Working Group may also wish to discuss whether paragraph 1 should refer to data integrity in the system or to integrity of the electronic transferable record.

*“Draft article 20. Delivery*

“Where the law requires the delivery of a paper-based transferable document or instrument or provides consequences for the absence of delivery, that requirement is met with respect to the use of an electronic transferable record through the transfer of control of an electronic transferable record.”

*“Draft article 21. Presentation*

“Where the law requires the presentation of a paper-based transferable document or instrument or provides consequences for the absence of presentation, that requirement is met with respect to the use of an electronic transferable record by demonstrating that the person has control of the electronic transferable record.”

**Remarks**

21. Draft articles 20 and 21 reflect the Working Group’s deliberations at its forty-eighth session (A/CN.9/797, paras. 91-94), and, in particular, the decision to have separate articles on delivery and presentation (A/CN.9/797, para. 93).

*“Draft article 22. Endorsement*

“Where the law requires [or permits] the endorsement of a paper-based transferable document or instrument or provides consequences for the absence of endorsement, that requirement is met with respect to the use of an electronic transferable record when information relating to [the endorsement] [the intention to endorse] is [logically associated or otherwise linked to] [included in] that electronic transferable record and that information is compliant with the requirements set forth in articles 8 and 9.”

**Remarks**

22. Draft article 22 reflects the Working Group’s deliberations at its forty-eighth session (A/CN.9/797, paras. 95-97).

23. Draft article 22 highlights the elements necessary for endorsement while retaining the reference to compliance with the requirements for functional equivalence of written form and signature.

24. The Working Group may wish to consider whether the words [the intention to endorse] better reflect the fact that the endorsement takes effect only after the information relating to the intention to endorse is logically associated to the electronic transferable record.

25. The words [or permits] have been added to ensure that cases where the law provides consequences, but does not require an endorsement would also be captured.

26. The words [logically associated or otherwise linked to] are the same terms that refer to the inclusion of information in an electronic transferable record in the definition of “electronic record” contained in draft article 3. The words [included in] are the same terms

that refer to the inclusion of information in an electronic transferable record currently used in draft article 24 with respect to amendment of an electronic transferable record and in other draft provisions. The Working Group may wish to consider which terms are more appropriate and provide guidance on their uniform use in the draft provisions.

27. The Working Group may wish to confirm that issues relating to the validity of an endorsement remain a matter of substantive law.

***“Draft article 23. Transfer of an electronic transferable record***

“1. [To transfer the electronic transferable record, the holder shall transfer the control of the record to the transferee.] [An electronic transferable record is transferred with the transfer of control from the holder to the transferee.]

“2. [[Subject to any rule of law governing the transfer of a paper-based transferable document or instrument] [When permissible under applicable law], the holder may:

(a) Transfer to a named person an electronic transferable record issued or transferred to bearer; or

(b) Transfer to bearer an electronic transferable record issued or transferred to a named person.]”

**Remarks**

28. Draft article 23 has been recast in light of the deliberations of the Working Group at its forty-eighth session (A/CN.9/797, paras. 98-100).

29. The Working Group may wish to consider adopting standard language for reference to non-mandatory legal requirements (i.e., cases in which the law permits but does not require a certain activity, such as those dealt with in draft articles 15, 22, 23, 24, 25, 27, 28 and 29).

30. Paragraph 2 deals with the possibility for the holder to change the rules for circulation of an electronic transferable record issued to bearer in an electronic transferable record to a named person and with the reverse case (“blank endorsement”).

31. The bracketed text in paragraph 2 aims at highlighting the fact that the change in the rules for transfer of the electronic transferable record (i.e., to bearer or to order) must be permissible under applicable substantive law. Differences between the two sets of bracketed text are intended to be editorial only.

32. The Working Group may wish to note that a provision dealing with the possibility of issuing electronic transferable records to bearer has been deleted as that possibility was encompassed in draft article 1, paragraph 2 (A/CN.9/797, para. 65). Accordingly, the Working Group may wish to consider deleting draft article 23, paragraph 2 (A/CN.9/797, para. 99) and clarifying the matter in the explanatory material.

***“Draft article 24. Amendment of an electronic transferable record***

“1. Where the law requires [or permits] the amendment of a paper-based transferable document or instrument [or provides consequences for the absence of an amendment], a reliable method shall be employed for amendment of information in an electronic transferable record whereby [all] the amended information is [accurately] reflected in the electronic transferable record and is readily identifiable as such.

“2. Upon amendment, a statement to the effect that an amendment has taken place shall be included in the electronic transferable record.”

**Remarks**

33. Draft article 24 has been recast in light of the suggestions received at the forty-eighth session (A/CN.9/797, para. 101). It provides a functional equivalence rule for instances in which an electronic transferable record may be amended.

34. The Working Group may wish to clarify whether all modifications entered in the electronic transferable record after its issuance would be considered an amendment and should therefore satisfy the requirements set forth in draft article 24.



35. The words [or permits] aim at capturing those instances in which applicable substantive law allows for amendment of the electronic transferable record by virtue of party autonomy but does not require it.

36. The words [all] and [accurately] aim at providing drafting options to introduce a duty to document any relevant change in the information contained in the electronic transferable record (A/CN.9/797, para. 72). If draft article 24 applied to all cases of amendment of an electronic transferable record, it could ensure, for instance, proper documentation of the chain of endorsements for an action of recourse (see A/CN.9/WG.IV/WP.124/Add.1, para. 15 and A/CN.9/797, para. 101, subpara. (a)).

37. Draft paragraph 2 aims at satisfying the goal of documenting changes to the electronic transferable record by requiring a statement relating to the amendment. That information requirement might not exist with respect to paper-based transferable documents or instruments due to the fact that amendments on paper are visible as such.

38. The Working Group may wish to consider whether a general standard reliability in draft article 11 of Option C (A/CN.9/WG.IV/WP.128, paras. 56-58) would apply to draft article 24 or whether a separate standard should be included in this draft article.

***“Draft article 25. Reissuance***

“1. When the law permits the reissuance of a paper-based transferable document or instrument, an electronic transferable record may be reissued.

“2. Upon reissuance of an electronic transferable record, a statement to the effect that a reissuance has taken place shall be included in the electronic transferable record.”

**Remarks**

39. Draft article 25 has been recast in light of the suggestions at the forty-eighth session (A/CN.9/797, para. 104). It now aims at providing a general rule on reissuance of electronic transferable records, which is possible whenever allowed by substantive law. The Working Group may wish to clarify that the provision would apply to issues specific to the use of electronic means, such as the corruption of the method of control of an electronic transferable record.

***“Draft article 26. Replacement***

“1. If a paper-based transferable document or instrument has been issued and the holder and the [issuer/obligor] agree to replace that document or instrument with an electronic transferable record:

(a) The holder shall [present] [surrender] [for replacement] the paper-based transferable document or instrument to the [issuer/obligor];

(b) The [issuer/obligor] shall issue to the holder, in place of the paper-based transferable document or instrument, an electronic transferable record that includes all information contained in the paper-based transferable document or instrument and a statement to the effect that it replaced the paper-based transferable document or instrument; and

(c) [After] [Upon] issuance of the electronic transferable record, the paper-based transferable document or instrument ceases to have any effect or validity.

“2. If an electronic transferable record has been issued and the holder and the [issuer/obligor] agree to replace that electronic transferable record with a paper-based document or instrument:

(a) The holder shall [present] [surrender] [for replacement] [transfer control of] the electronic transferable record to the [issuer/obligor];

(b) The [issuer/obligor] shall issue to the holder, in place of the electronic transferable record, a paper-based document or instrument that includes all information contained in the electronic transferable record and a statement to the effect that it replaced the electronic transferable record; and

(c) [After] [Upon] issuance of the paper-based document or instrument, the electronic transferable record ceases to have any effect or validity.

“3. Parties may consent to replacement at any time prior [or simultaneously] to the replacement.

“4. Replacement according to paragraphs 1 and 2 does not affect the rights and obligations of the parties.

“5. If, in accordance with the procedure set forth in paragraph 1, a paper-based transferable document or instrument has been [terminated] [invalidated], but the issuance of an electronic transferable record has not been perfected for technical reasons, the paper-based transferable document or instrument may be reissued in its original medium [or the replacing electronic transferable record may be issued].

“6. If, in accordance with the procedure set forth in paragraph 2, an electronic transferable record has been [terminated] [invalidated], but the issuance of a paper-based transferable document or instrument has not been perfected for technical reasons, the electronic transferable record may be reissued in its original medium [or the replacing paper-based transferable document or instrument may be issued].”

### Remarks

40. Draft article 26 reflects the suggestions at its forty-eighth session (A/CN.9/797, paras. 102-103).

41. The Working Group may wish to consider whether the word [upon] should be replaced by the word [after] to more accurately indicate that cessation of validity and effect is subject to successful issuance of the replacing record, or document or instrument. Alternatively, the Working Group may wish to consider specifying in draft article 26 that the replaced record, or document or instrument, will cease to have effect or validity only after issuance of its replacement.

42. The Working Group may wish to clarify whether the term “all information” in subparagraph 2(b) refers only to substantive information or includes also technical information specific to the electronic medium (A/CN.9/797, para. 103).

43. The Working Group may wish to further discuss which parties, in addition to the holder, ought to consent to or otherwise be involved in the replacement as it is unlikely that the substantive law would have any provision regarding the change of medium (A/CN.9/761, para. 76). While a replacement would generally require the consent of the obligor(s), the obligor would, in such a case, be able to request a replacement when the document, instrument or record for performance is presented (A/CN.9/768, para. 101). Thus, requiring the obligor’s consent for replacement prior to presentation might not be necessary.

44. The Working Group may wish to consider paragraph 3 in conjunction with draft article 14 providing a general rule on consent requirement. It should be noted that paragraph 3 aims at providing the possibility of prior consent to replacement.

45. The Working Group may wish to consider whether to retain paragraph 4, whose purpose is to clarify that substantive rights and obligations are not affected by replacement, or to include such clarification in the explanatory material.

46. Draft article 26, paragraphs 5 and 6 deal with the case in which during the replacement the pre-existing transferable document or instrument, or the electronic transferable record has been destroyed, but for technical reasons the corresponding record, document or instrument has not been issued. Such rule may not be contained in substantive law since it is specific to replacement involving an electronic transferable record.

47. The Working Group may wish to consider whether the word [terminated] is adequate for the purpose of paragraphs 5 and 6, which refers to situations where the paper-based transferable documents or instrument or the electronic transferable record ceases to have any effect or validity as mentioned in subparagraphs 1(c) and 2(c). The word [invalidated] might be another drafting option.

*“Draft article 27. Division and consolidation of an electronic transferable record*

“1. Where the law permits the division or consolidation of a paper-based transferable document or instrument, a reliable method for division or consolidation of an electronic transferable record shall be provided.

“2. If an electronic transferable record has been issued and the holder and the [issuer/obligor] agree to divide the electronic transferable record into two or more electronic transferable records:

(a) The holder shall [transfer] [present for division] the electronic transferable record to the [issuer/obligor];

(b) Two or more new electronic transferable records shall be issued and include: (i) a statement to the effect that division has taken place; (ii) date of division; and (iii) information to identify the pre-existing electronic transferable record and the new electronic transferable records; and

(c) Upon division, the pre-existing electronic transferable record ceases to have any effect or validity and shall include: (i) a statement to the effect that division has taken place; (ii) date of division; and (iii) information to identify the resulting new electronic transferable records.

“3. If the holder of two or more electronic transferable records, the [issuer/obligor] of which is the same, agrees with the [issuer/obligor] to consolidate the electronic transferable records into a single electronic transferable record:

(a) The holder shall [transfer] [present for consolidation] the electronic transferable records to the [issuer/obligor];

(b) The consolidated electronic transferable record shall be issued and include: (i) a statement to the effect that consolidation has taken place; (ii) date of consolidation; and (iii) information to identify the pre-existing electronic transferable records;

(c) Upon consolidation, the pre-existing electronic transferable records cease to have any effect or validity and shall include: (i) a statement to the effect that consolidation has taken place; (ii) date of consolidation; and (iii) information to identify the consolidated electronic transferable record.”

**Remarks**

48. Draft article 27 reflects the Working Group’s suggestions at its forty-eighth session (A/CN.9/797, para. 106). In deliberating, the Working Group may wish to refer also to the considerations expressed in A/CN.9/WG.IV/WP.124/Add.1, paragraphs 33-34. The word [transfer] is suggested instead of the word [present] to avoid reference to substantive law notions.

*“Draft article 28. Termination of an electronic transferable record*

“1. Where the law requires or permits the termination of a paper-based transferable document or instrument, a reliable method shall be provided to prevent further circulation of the electronic transferable record.

“2. Where the law requires that a statement to indicate the termination of a paper-based transferable document or instrument be included in the document or instrument, that requirement is met by including a statement in the electronic transferable record to the effect that it has been terminated.”

**Remarks**

49. Draft article 28 reflects the suggestions at the forty-eighth session (A/CN.9/797, para. 106). It now contains a general functional equivalence rule.

50. The Working Group may wish to consider whether a general standard of reliability in draft article 11 of Option C (A/CN.9/WG.IV/WP.128, paras. 56-58) would apply to draft article 28 or whether a separate standard should be included in this draft article.

*“Draft article 29. Use of an electronic transferable record for security right purposes*

“Where the law permits the use of a paper-based transferable document or instrument for security right purposes, a reliable method to allow the use of electronic transferable records for security right purposes shall be provided.”

**Remarks**

51. Draft article 29 reflects the suggestion made at the forty-eighth session that it should be formulated as a functional equivalence rule (A/CN.9/797, para. 106).

52. The Working Group may wish to consider whether a general standard of reliability in draft article 11 of Option C (A/CN.9/WG.IV/WP.128, paras. 56-58) would apply to draft article 29 or whether a separate standard should be included in this draft article.

*“Draft article 30. Retention of [information in] an electronic transferable record*

“1. Where the law requires that a paper-based transferable document or instrument [or information therein] be retained, that requirement is met by retaining an electronic transferable record [or information therein] if the following conditions are satisfied:

(a) The information contained therein is accessible so as to be usable for subsequent reference;

(b) The integrity of the electronic transferable record is assured in accordance with draft article 12 of Option A [, apart from any change that arises from the need to ensure that the record may not further circulate];

[(c) Information [, if any,] enabling the identification of the issuer and holder of the electronic transferable record and the date and time when it was issued and transferred as well as when [it ceases to have any effect or validity][it is terminated] is made available;]

(d) The electronic transferable record is retained in the format in which it was generated, transferred and presented for performance, or in a format which can be demonstrated to represent accurately the information generated, sent or received; and

[(e) Information enabling the identification of the parties involved in the life cycle of the electronic transferable record and the date and time of their involvement is made available.]

“2. A person may satisfy the requirement referred to in paragraph (1) by using the services of a third party, provided that the conditions set forth in subparagraphs (a)-(e) of paragraph 1 are met.”

**Remarks**

53. Draft article 30 aims at introducing a general rule on retention of electronic transferable records. It is based on article 10 of the UNCITRAL Model Law on Electronic Commerce.

54. The words [, apart from any change that arises from the need to ensure that the record may not further circulate] were added in paragraph 1(b) to reflect the fact that the retained electronic transferable record may no longer circulate.

55. Additional requirements have been added in light of the importance attributed to the accurate recording of the information relating to the circulation of the electronic transferable record (A/CN.9/797, para. 72).

56. The Working Group may wish to consider whether subparagraphs 1(c) and 1(e) should be deleted as they specify the condition expressed in subparagraph 1(b). In that case, the Working Group may wish to consider whether a corresponding comment should be added to the explanatory material.

57. The Working Group may also wish to consider whether the words [, if any,] should be retained in paragraph 1(c) in light of the possibility of issuing and transferring an electronic transferable record to bearer (and not to a named person).

58. The Working Group may wish to consider whether a specific provision on the duty of retention in case of replacement should be added to the draft provisions (A/CN.9/797, para. 104, subpara. (b) and A/CN.9/124/Add.1, para. 43). In that case, the Working Group may wish to consider if that provision should extend also to retention of paper-based transferable documents or instruments, given that substantive law is not likely to provide for replacement, which involves the electronic medium.

#### **D. Third-party service providers**

##### ***“Draft article 31. Conduct of a third-party service provider***

“Where a third-party service provider supports the use of an electronic transferable record, that third-party service provider shall:

- (a) Act in accordance with statements made by it with respect to its policies and practices;
- (b) Exercise reasonable care to ensure the accuracy of all statements made by it;
- (c) Provide reasonably accessible means that enable a relying party to ascertain from an electronic transferable record information about it;
- (d) Provide reasonably accessible means that enable a relying party to ascertain, where relevant, from an electronic transferable record:
  - (i) The method used to identify the [issuer/obligor] and the holder;
  - (ii) That the electronic transferable record retained its integrity and has not been compromised;
  - (iii) Any limitation on the scope or extent of liability stipulated by the third-party service provider;
- (e) Use trustworthy systems, procedures and human resources in performing its services.”

##### ***“Draft article 32. Trustworthiness***

“For the purposes of article 31, subparagraph (e) in determining whether, or to what extent, any systems, procedures and human resources utilized by a third-party service provider are trustworthy, regard may be had to the following factors:

- (a) Financial and human resources, including existence of assets;
- (b) Quality of hardware and software systems;
- (c) Procedures for processing of electronic transferable record;
- (d) Availability of information to related parties;
- (e) Regularity and extent of audit by an independent body;
- (f) The existence of a declaration by the State, an accreditation body or the third-party service provider regarding compliance with or existence of the foregoing; and
- (g) Any other relevant factor.”

59. Based on articles 9 and 10 of the UNCITRAL Model Law on Electronic Signatures, draft articles 31 and 32 on third-party service providers had already been revised in light of the considerations by the Working Group, bearing in mind the principle of technological neutrality (A/CN.9/768, paras. 107-110). They are provided for guidance purposes only, encompassing all third-party service providers (A/CN.9/761, para. 27).

60. The placement of these draft articles would depend on the final form of the draft provisions. Moreover, it was suggested that those draft articles ought to be placed in an explanatory note as they are regulatory in nature (A/CN.9/797, para. 107).

61. The Working Group may also wish to clarify the meaning of the term “relying party” in draft article 31 (A/CN.9/797, para. 107).

## E. Cross-border recognition of electronic transferable records

### *“Draft article 33. Non-discrimination of foreign electronic transferable records*

“1. An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it was issued or used in a foreign State [, or that its issuance or use involved the services of a third party based, in part or wholly, in a foreign States] [, if it offers a substantially equivalent level of reliability].

“2. Nothing in this Law affects the application of rules of private international law governing a paper-based transferable document or instrument to electronic transferable records.”

### **Remarks**

62. At the forty-fifth session of the Commission in 2012, the need for an international regime to facilitate the cross-border use of electronic transferable records was emphasized.<sup>1</sup> The Working Group also reiterated the importance of cross-border legal recognition of electronic transferable records (A/CN.9/761, paras. 87-89).

63. Draft article 33 aims at eliminating obstacles to cross-border recognition of an electronic transferable record arising exclusively from its electronic nature.

64. The Working Group may wish to clarify if, for instance, under draft article 33, an electronic transferable record issued in a jurisdiction that does not permit the issuance and use of electronic transferable records, but otherwise compliant with substantive law requirements of that jurisdiction, could be recognized in another jurisdiction enacting draft article 33.

65. The Working Group may wish to consider whether a requirement of substantially equivalent level of reliability should be introduced in the draft provisions. The words [, if it offers a substantially equivalent level of reliability] may be found in article 12, paragraph 3 of the UNCITRAL Model Law on Electronic Signatures.

66. Paragraph 2 reflects the Working Group’s understanding that the draft provisions should not displace existing private international law applicable to paper-based transferable documents or instruments (A/CN.9/768, para. 111).

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<sup>1</sup> *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 83.

## V. INSOLVENCY LAW

### A. Report of the Working Group on Insolvency Law on the work of its forty-fourth session (Vienna, 16-20 December 2013)

(A/CN.9/798)

[Original: English]

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## I. Introduction

### (a) Centre of main interests and directors' obligations

1. At its forty-sixth session in 2013, the Commission finalized and adopted<sup>1</sup> two texts on insolvency law: (a) the revised Guide to Enactment and Interpretation of the Model Law on Cross-Border Insolvency (set forth in A/CN.9/WG.V/WP.112, and revised by the Working Group at its forty-third session (A/CN.9/766) and by the Commission (A/68/17, para. 197)); and (b) part four of the Legislative Guide on Insolvency Law addressing the obligations of directors in the period approaching insolvency (set forth in A/CN.9/WG.V/WP.113, and revised by the Working Group at its forty-third session (A/CN.9/766) and by the Commission (A/68/17, para. 202)).

2. Those two texts were developed pursuant to a mandate<sup>2</sup> given to Working Group V in 2010 to initiate work on two insolvency topics: (a) providing guidance on the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) relating to centre of main interests (COMI) and possibly to develop a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and

<sup>1</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, paras. 198 and 204.

<sup>2</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 259.

recognition, in a manner that would not preclude the development of a convention; and (b) addressing the responsibility and liability of directors and officers of an enterprise in insolvency and pre-insolvency cases.

3. In recommending those two texts to the Commission for adoption, Working Group V noted that it had not yet completed its work on implementing the mandate received from the Commission and that there were pending issues to be addressed before the mandate was exhausted, specifically the concept of centre of main interests as it related to facilitating the conduct of cross-border insolvency proceedings concerning enterprise groups,<sup>3</sup> and directors' obligations in the context of enterprise groups,<sup>4</sup> together with that part of the mandate relating to the possible development of a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, in a manner that would not preclude the development of a convention.<sup>5</sup>

4. At its forty-sixth session, after adopting the two texts noted above, the Commission decided that Working Group V should hold a colloquium in the first few days of the working group session scheduled for the second half of 2013 to clarify how it would proceed with the enterprise group issues and other parts of its current mandate and to consider topics for possible future work, including insolvency issues specific to micro, small and medium enterprises (MSMEs). The conclusions of that colloquium would not be determinative, but should be considered and evaluated by the Working Group in the remaining days of that session, in the context of the existing mandate. Topics identified for possible future work should be reported to the Commission in 2014.<sup>6</sup>

#### **(b) Insolvency of large and complex financial institutions**

5. At its forty-third session (2010), the Commission agreed that the study proposed by Switzerland on the insolvency of large and complex financial institutions (see A/CN.9/WG.V/WP.93/Add.5 and A/CN.9/709, particularly para. 7) should be undertaken by the Secretariat as resources permitted. It was noted in that regard that reports on work being undertaken by a number of other organizations on the same topic were expected by the end of 2010 and that those reports should be factored into the Secretariat's work. It was anticipated that coordination would be sought between the Secretariat and other interested international organizations.<sup>7</sup>

6. The Working Group first considered this topic at its forty-second session on the basis of a note prepared by the Secretariat (A/CN.9/WG.V/WP.109), reporting on the activities being undertaken by other organizations. The deliberations and conclusions of the Working Group on this topic are included in the report of that session (A/CN.9/763, paras. 95-96).

## **II. Organization of the session**

7. The first three days of the session (16-18 December) were devoted to the colloquium noted above in paragraph 4, which considered issues relating to remaining elements of the existing mandate, topics for possible future work and issues already mandated for future work. Following the colloquium, the Working Group convened on 19 and 20 December.

8. Working Group V, which was composed of all States members of the Commission, held its forty-fourth session in Vienna from 16-20 December 2013. The session was attended by representatives of the following States Members of the

<sup>3</sup> A/CN.9/766, paras. 103 and 105-107.

<sup>4</sup> *Ibid.*, paras. 104 and 105-107.

<sup>5</sup> *Ibid.*, paras. 105-107.

<sup>6</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 325.

<sup>7</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 260.



Working Group: Austria, Belarus, Brazil, Canada, China, Colombia, Croatia, Denmark, El Salvador, France, Germany, Greece, Indonesia, Iran (Islamic Republic of), Italy, Japan, Mexico, Pakistan, Paraguay, Republic of Korea, Russian Federation, Spain, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

9. The session was attended by observers from the following States: Belgium, Bolivia (Plurinational State of), Chile, Cyprus, Czech Republic, Dominican Republic, Iraq, Lithuania, Poland, Qatar, Romania, Slovenia and United Arab Emirates.

10. The session was attended by observers from the European Union.

11. The session was also attended by observers from the following international organizations:

(a) *Organizations of the United Nations system*: International Monetary Fund and World Bank;

(b) *Invited inter-governmental organizations*: Inter-Parliamentary Assembly of the Eurasian Economic Community;

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN), European Law Students Association (ELSA), INSOL International (INSOL), International Bar Association (IBA), International Insolvency Institute (III), International Swap and Derivatives Association (ISDA), International Women's Insolvency and Restructuring Confederation (IWIRC), Union Internationale des Avocates (UIA) and Union Internationale des Huissiers de Justice et Officier Judiciaires (UIHJ).

12. The Working Group elected the following officers:

*Chairman*: Mr. Wisit Wisitsora-At (Thailand)

*Rapporteur*: Ms. Jasnica Garašić (Croatia)

13. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.116);

(b) A note by the Secretariat outlining a summary of the previous discussions with respect to the remaining elements of its existing mandate, as well as proposals for possible future work (A/CN.9/WG.V/WP.117);

(c) A note by the Secretariat on recent developments with respect to the insolvency of large and complex financial institutions (A/CN.9/WG.V/WP.118).

14. The Working Group adopted the following agenda:

1. Opening of the session.

2. Election of officers.

3. Adoption of the agenda.

4. Consideration of: (a) remaining elements of the current mandate of Working Group V; (b) topics for possible future work; and (c) mandated future work.

5. Other business.

7. Adoption of the report.

### III. Deliberations and decisions

15. The Working Group engaged in discussions on: (a) cross-border insolvency of multi-national enterprise groups; (b) the proposal for a convention or model law on selected international insolvency issues, including choice of law; (c) insolvency of large and complex financial institutions; (d) obligations of directors of enterprise

group of companies in the period approaching insolvency; (e) issues relating to creditors and claims; (f) the insolvency treatment of financial contracts; (g) regulation of insolvency practitioners; (h) the enforcement of insolvency-derived judgements; (i) insolvency treatment of intellectual property; and (j) expedited proceedings, including pre-packs and other mechanisms suitable for the insolvency of MSMEs on the basis of documents A/CN.9/WG.V/WP.117, and A/CN.9/WG.V/WP.118 as well as the presentations made at the colloquium. The deliberations and decisions of the Working Group on these topics are reflected below.

#### **IV. Working Group V's current mandate**

##### **A. Facilitating the cross-border insolvency of multinational enterprise groups**

16. The Working Group agreed to continue its work on cross-border insolvency of multinational enterprise groups by developing provisions on the following issues, a number of which would extend the existing provisions of the Model Law on Cross-Border Insolvency and part three of the Legislative Guide, and involve reference to the Practice Guide on Cross-Border Insolvency Cooperation:

- (a) Provision of access to foreign courts for foreign representatives and creditors of insolvency proceedings involving enterprise group members;
- (b) Recognition of foreign proceedings and foreign representatives (as between different proceedings concerning different group members), including recognition of foreign proceedings commenced against several group members at the same court;
- (c) Distinctions between main and non-main insolvency proceedings might not be useful in group enterprise insolvencies;
- (d) Recognition of one foreign proceeding as the coordinating proceeding, in appropriate circumstances;
- (e) Identification of the "parent" and/or "primary group members" of an enterprise group that might adopt the role of, for example, facilitating development of a reorganization (or liquidation) plan, coordinating continuation or replacement of existing finance, and retaining professionals;
- (f) Provision of "standing" for all group members in any insolvency proceeding applied for by a member of the enterprise group;
- (g) Joint appointment of insolvency representatives to insolvency proceedings concerning different group members;
- (h) Consideration of group members voluntarily joining the insolvency proceeding of the parent group member and agreeing to subject themselves to the jurisdiction of that proceeding;
- (i) Use of "synthetic proceedings" (where creditors are treated in the main proceeding as if a non-main proceeding had opened) to reduce cost and expense;
- (j) Joint financing among members of the enterprise group addressing issues of collateralization, supplier credit, guarantees, obligations and validation of collateral granted and priority for funds advanced;
- (k) Authorization of contact and coordination between the courts and between the insolvency representatives (including foreign representatives or other members designated by a group) across enterprise group members subject to insolvency proceedings;
- (l) Use of protocols to clearly define procedures and roles;
- (m) Provision for joint/coordinated disclosure statements and plans of reorganization;

- (n) Affirmation of the corporate identity and independence of group members;
- (o) Provision of relief by a recognizing court to the foreign representative(s) presiding over the proceedings of several group members commenced in the same forum; and
- (p) Provision of relief by a recognizing court to the foreign representative(s) presiding over the coordinating proceeding.

17. Having considered the form those provisions might take, the Working Group decided that their precise form could be decided as the work progressed. Those provisions might, for example, be a set of model provisions or a supplement to the existing Model Law.

## **B. Convention on selected international insolvency issues**

18. Support was expressed in favour of the development of a convention as described in the proposal in paragraphs 7 to 16 of A/CN.9/WG.V/WP.117. This view was based on the need for binding norms to facilitate execution of insolvency decisions, to coordinate many aspects of cross-border insolvencies, particularly in the group context, and to deal with concerns arising in the view of some States that application of the Model Law should be reciprocal. However, a number of reservations about the feasibility of negotiating a convention were expressed, including whether there would be sufficient support from States for such an instrument, the competence of member States in regional economic integration organizations to participate in the negotiations, the time required for such negotiations, and the benefits of a convention over the existing Model Law. With respect to the latter point, the question was raised as to why the Model Law had not been more widely adopted. It was observed that many States were focused on reforming their domestic insolvency laws and asking them to consider cross-border insolvency law at the same time would be unrealistic. It was noted that adoption of the Model Law was part of a broader insolvency law reform program and that several more States were expected to enact the Model Law by the end of 2014.

19. Following expressions of support from a number of delegations, the Working Group agreed that it might be appropriate to study the feasibility of developing a convention, including gathering information on the issues facing States with respect to adoption of the Model Law. That study might be conducted informally by an ad hoc group of interested delegations that could provide information to the Working Group for further discussion. The Secretariat was requested to facilitate such efforts on the part of interested delegations.

## **C. Insolvency of large and complex financial institutions**

20. In view of developments subsequent to the inclusion of the proposal on cross-border insolvency of financial institutions in paragraphs 17 to 22 of document A/CN.9/WG.V/WP.117, the Working Group was provided with information modifying and clarifying the original proposal. Based on this additional information, the Working Group noted that in October 2013, the Financial Stability Board (FSB) had established a working group of legal experts with the mandate to address certain gaps in the implementation of Key Attribute 7.5 and ensure that countries developed expedited processes to give effect to foreign resolution actions and to present its preliminary conclusions and recommendations in autumn 2014. The Working Group noted that coordinating the work of organizations active in the field of international trade law, both within and outside the United Nations system, is an increasingly important task of UNCITRAL and that that task should be aimed at encouraging cooperation, at avoiding duplication of effort and promoting efficiency, consistency and coherence in the modernization and harmonization of international trade law.

21. On that basis, the Working Group agreed to continue with its current mandate referring to cross-border insolvency of financial institutions by:

(a) Welcoming the initiative of the FSB to establish a group of legal experts with the mandate to develop Key Attribute 7.5 regarding the recognition of foreign resolution actions and cross-border cooperation, and acknowledging the leading role of the FSB expert group in the development of this Key Attribute;

(b) Expressing its willingness and availability to share its know-how and legislative expertise with the FSB and its legal expert group, be it through support by the UNCITRAL secretariat, by participating in joint expert meetings or by any other means that the involved bodies may deem appropriate; and

(c) Expressing its intention to, as the FSB's legal expert group work progresses, consider its preliminary conclusions and recommendations and to report back to the Commission at a future session on what work by UNCITRAL might be desirable and feasible in the field of effective resolution regimes for financial institutions.

22. Ultimately, the Working Group encouraged the Secretariat to continue with its current mandate to monitor developments in this field, namely regulatory developments within supranational bodies or in selected national legislation.

#### **D. Obligations of directors of enterprise group companies in the period approaching insolvency**

23. The Working Group agreed on the importance of this topic given that there were clearly difficult practical problems in this area and that solutions would be of great benefit to the operation of efficient insolvency regimes. At the same time, the Working Group noted that there were issues that needed to be considered carefully so that solutions would not hinder business recovery, make it difficult for directors to continue to work to facilitate that recovery, or influence directors to prematurely commence insolvency proceedings. In light of those considerations, the Working Group agreed that it would be helpful to have the next steps taken informally in an expert group whose task would be to examine how part four of the Legislative Guide could be applied in the enterprise group context and any additional issues (such as conflicts between a director's duty to its own company and the interests of the group and issues of governing law) that might need to be addressed. The informal expert group would report back to the Working Group no later than the session in the second half of 2014.

### **V. Topics for possible future work**

#### **A. Choice of law**

24. The Working Group noted that choice of law issues formed part of the proposal for a convention (as discussed above), and that some of the elements to be addressed in the context of further work on enterprise groups (such as synthetic secondary proceedings and directors' obligations) raised choice of law questions that would need to be addressed in the course of that work. However, paragraphs 12 to 16 of document A/CN.9/WG.V/WP.117 outlined a proposal for articulating principles on choice of law that could constitute possible future work. The Working Group expressed support for that proposal, noting that choice of law issues were key to many of the topics discussed in document A/CN.9/WG.V/WP.117.

#### **B. Issues relating to creditors and claims**

25. The Working Group agreed on the importance of a number of the issues raised under this heading (paragraphs 26 to 34, A/CN.9/WG.V/WP.117) and noted that several of them were likely to be addressed in the context of facilitating

reorganization of enterprise groups, for example, access to information and creditor participation. The Working Group also noted that some of the issues could be addressed at a procedural level, but could raise significant difficulties if approached from a substantive perspective, for example, procedures for making claims as opposed to quantification of claims. Although there was support for undertaking work on some of these issues, it was felt that they were not a priority at this stage in view of the other topics being proposed.

### **C. Insolvency treatment of financial contracts and netting**

26. In considering paragraphs 35 to 38 of document A/CN.9/WG.V/WP.117, it was observed that the development of the Unidroit Principles on Close-Out Netting had led to there being some inconsistency with recommendations 101 to 107 of the Legislative Guide on Insolvency Law and some concern was raised that the Legislative Guide no longer reflected best practice. One view was that in order to avoid reopening issues that had been carefully resolved in the Principles, no further work on the Legislative Guide was required. Related views were that the Legislative Guide should refer to the Principles or that that chapter of the Legislative Guide should be deleted. A different view was that if the Guide no longer reflected best practice, it needed to be addressed by the Working Group and that any concern about duplication should be allayed by the fact that the Principles focus on close-out netting, while the Legislative Guide deals with a broader range of issues. There was general agreement that any work revising the Guide should ensure that there was no contradiction with the Principles or with other work being carried out on related issues by organizations such as the FSB and should take into account the different treatment in insolvency of banks and financial institutions on the one hand and non-bank and non-financial institutions on the other. The prevailing view was that future work on this topic should be undertaken.

### **D. Regulation of insolvency practitioners**

27. While support was expressed in favour of the proposal contained in paragraphs 39 to 41 of A/CN.9/WG.V/WP.117, the Working Group was of the view that that work might best be developed informally in cooperation with relevant professional bodies such as the International Association of Insolvency Regulators (IAIR) with a view to possible consideration by the Working Group at a later date.

### **E. Enforcement of insolvency-derived judgements**

28. Notwithstanding that the case in question, as noted in paragraph 42 of document A/CN.9/WG.V/WP.117, was an English case, the Working Group was of the view that it brought to light problems of a global nature. Strong support was therefore expressed in favour of the topic outlined in paragraphs 42 to 43 of that document. The Working Group noted that the Model Law did not provide an explicit solution for recognition and enforcement of insolvency-derived judgements, which had led to significant uncertainty and could have a chilling effect on further adoptions of the Model Law. Accordingly, it was an opportune time to address recognition and enforcement of these types of judgements, possibly by way of a supplement to the Model Law. A proposal to add recognition of discharge orders was also supported.

### **F. Treatment of intellectual property contracts in cross-border insolvency cases**

29. The Working Group expressed interest in the proposal set forth in paragraphs 44 to 49 of document A/CN.9/WG.V/WP.117. Noting that it had already been addressed in the Intellectual Property Supplement to the Secured Transactions

Guide, it was suggested that it might be appropriate to consider the issue as a supplement to the Legislative Guide on Insolvency Law.

### **G. Priorities for future work**

30. The Working Group agreed that there remained significant areas for possible future work in the field of insolvency law. Having considered the priority in which work on the topics above might be undertaken, the Working Group was strongly of the view that at an appropriate time it should seek a mandate from the Commission to commence work on recognition and enforcement of insolvency-derived judgements. The Working Group was also of the view that choice of law, review of the Legislative Guide chapter on insolvency treatment of financial contracts and netting, and the treatment of intellectual property contracts in cross-border insolvency cases were important issues that warranted consideration, and should be retained in that order as candidates for possible future work.

**B. Note by the Secretariat on background information on topics  
comprising the current mandate of Working Group V and  
topics for possible future work**

(A/CN.9/WG.V/WP.117)

[Original: English]

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## **Introduction**

1. In July 2013, the Commission adopted the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (the UNCITRAL Model Law), which includes new material on aspects of the concept of “centre of main interests” and part four of the UNCITRAL Legislative Guide on Insolvency Law (the UNCITRAL Insolvency Guide), which addresses the obligations of directors in the period approaching insolvency. The Commission noted, however, that the current mandate of Working Group V as it related, inter alia, to “centre of main interests”, had not been exhausted by completion of the Guide to Enactment and Interpretation and that issues relating to enterprise groups remained. The Commission agreed that Working Group V (Insolvency Law) should hold a colloquium in the first few days of the working group session scheduled for the second half of 2013 to clarify how it would proceed with the enterprise group issues and other remaining parts of its current mandate. It should also consider topics for possible future work, including insolvency issues specific to micro, small and medium-sized enterprises. The conclusions of the colloquium would not be determinative but should be considered and evaluated by the Working Group in the remaining days of that session, in the context of the existing mandate. Topics identified for possible future work should be reported to the Commission in 2014.<sup>1</sup>

2. This note by the Secretariat provides (a) background information on topics that form part of the current mandate of Working Group V and references to relevant

<sup>1</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17, (A/68/17), para. 326.*

UNCITRAL documents; and (b) information and proposals on topics that might form the basis of possible future work on insolvency law.

## **I. Working Group V's current mandate**

### **A. Facilitating the cross-border insolvency of multi-national enterprise groups**

#### **1. UNCITRAL references**

UNCITRAL Legislative Guide on Insolvency Law, part three

UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation

A/CN.9/WG.V/WP.74/Add.2, paragraphs 5-12

A/CN.9/WG.V/WP.76/Add.2, paragraphs 2-17

A/CN.9/WG.V/WP.82/Add.4, paragraphs 10-15

A/CN.9/WG.V/WP.85/Add.1, paragraphs 3-13

A/CN.9/WG.V/WP.99, paragraphs 55-64

A/CN.9/618, paragraph 54

A/CN.9/666, paragraphs 26-27

A/CN.9/671, paragraphs 18-23

A/CN.9/738, paragraphs 36-37

A/CN.9/WG.V/WP.114

#### **2. Background**

3. In 2006, a proposal noted that since the business of corporations is increasingly conducted, both domestically and internationally, through enterprise groups, they are an important feature of the global economy and significant to international trade and commerce. In response, Working Group V commenced work in the area of the treatment of enterprise groups in insolvency. Notwithstanding that significance to international trade, and the importance not only of knowing how a group will be treated in insolvency if its business fails, but also of fast and efficient mechanisms for the resolution of its financial difficulties, the proposal also noted that very few, if any, States recognized enterprise groups as distinct legal entities or had a comprehensive regime for their treatment in insolvency.

4. The Commission adopted part three of the UNCITRAL Legislative Guide, which specifically addresses the treatment of enterprise groups in insolvency, both domestically and in a cross-border context, in 2010.

5. Following the completion of part three, Working Group V was given a mandate to consider selected aspects of the concept of "centre of main interests" (COMI) as used in the UNCITRAL Model Law with a view to providing more guidance and information on its interpretation and application. At its forty-second session (2012), the Working Group expressed the following views: it was necessary to look at the issue of COMI as it related to enterprise groups because most commercial activity was currently conducted through such groups; the scope of its mandate with respect to COMI as originally approved included COMI in the context of enterprise groups; and that that topic should be considered upon completion of the revisions proposed for the Guide to Enactment of the Model Law (A/CN.9/763, paras. 13-14).

6. Document A/CN.9/WG.V/WP.114 (forty-third session of the Working Group) provides a summary of the working papers considered by previous working group sessions with respect to the idea of determining the COMI or a coordinating centre for enterprise groups, particularly in the cross-border context, and the conclusions of the Working Group on those papers. It is not possible to repeat that material in this



note, however the conclusions reached by the Working Group highlight the difficulties of applying that notion to enterprise groups and account for the approach adopted in part three of the Legislative Guide of focusing on cooperation and coordination in cross-border proceedings involving enterprise groups.

## **B. Convention on selected international insolvency issues<sup>2</sup>**

### **1. UNCITRAL references**

A/CN.9/686

A/CN.9/WG.V/WP.93/Add.6

UNCITRAL Legislative Guide on Insolvency Law, part two, chapter 1, paragraphs 80-91 and recommendations 30-34

UNCITRAL Legislative Guide on Secured Transactions, chapter XII, paragraphs 14-17 and recommendation 223

### **2. Background**

7. At its thirty-seventh session (2009), the Working Group had before it:

“127. ... a proposal by the Union Internationale des Avocats (UIA) on a possible international convention in the field of international insolvency law, which might cover the following issues:

- (a) Granting of access to courts to foreign insolvency representatives;
- (b) Recognition of foreign insolvency proceedings (with the effect of granting the foreign proceeding the rights of a national proceeding or triggering a secondary proceeding); and
- (c) Cooperation and communication between insolvency representatives and courts.

“128. If agreement on those issues seemed possible, the proposal suggested the international convention might also contain provisions on:

- (a) Direct competence (“convention double”)[for the opening of insolvency proceedings, whether main or non-main];
- (b) Applicable law (“convention triple”, could be part of a separate protocol).”<sup>3</sup>

8. Support was expressed by the Working Group in favour of the goal of developing an international convention, but there were reservations with respect to the feasibility of reaching agreement, particularly in view of the difficulties encountered in the past in the area of international insolvency law.

9. At its thirty-eighth session (2010), and in the context of further consideration of topics for possible future work, the Working Group noted the connection between a proposal to undertake work on providing more guidance and information on the concept of COMI as used in the UNCITRAL Model Law (the project undertaken as revisions to the Guide to Enactment of the Model Law adopted by the Commission in 2013) and the proposal to develop a convention. There was considerable support for the view that, in line with the approach adopted in previous work of the Working Group, the topics could be approached in a manner that would not preclude the

<sup>2</sup> This topic was originally proposed by the Union Internationale des Avocats (UIA) and supported by the International Bar Association (IBA). The material included in this paper has been revised to include additional material provided by the UIA and by the IBA.

<sup>3</sup> Report of Working Group V (Insolvency Law) on the work of its thirty-seventh session (A/CN.9/686).

development of a convention. The mandate given by the Commission in 2010 reflects that possibility.<sup>4</sup>

10. At its thirty-eighth session, the Working Group also had before it comments provided by the International Bar Association (IBA) on the UIA proposal (A/CN.9/WG.V/WP.93/Add.6), expressing the global legal profession's support of that proposal for an international insolvency convention to encourage judicial and administrative cooperation and coordination in cross-border insolvency cases, including enterprise group cases. The IBA has noted that breakdowns of international cooperation in cross-border insolvency cases continue despite the UNCITRAL Model Law, and threaten the progress of international trade and economic development. Cross-border judicial and administrative conflicts often result in job losses, erosion of enterprise value, misallocation of assets and costly cross-border litigation. Court-to-court communication and cooperation guidelines and similar aids, while extremely useful, are not consistently employed. These challenges could effectively be addressed by an insolvency convention primarily focused on procedural issues such as cross-border recognition, enforcement of orders, judicial and administrative communication and cooperation, and so forth.

11. Further material prepared by the UIA notes the following points:

(a) Due to the differences between insolvency regimes of the several States, the UNCITRAL Model Law on Cross-Border Insolvency has been incorporated into domestic legal systems of the States to a limited extent. Faced with this problem, an international convention<sup>5</sup> would be the most appropriate technical regulation to harmonize and codify international insolvency law, facilitating the mutual recognition of foreign insolvency proceedings in different Contracting States;

(b) The need for an international convention has become even more apparent in the course of insolvency proceedings affecting corporate groups. The absence of binding instruments to regulate the international aspects of enterprise group insolvency hampers homogeneous solutions by applying national law of States which is not conducive to proper development of cross-border insolvency proceedings and reorganization plans of the group companies. An international convention would provide solutions within enterprise groups since it would allow the recognition of foreign proceedings, access for insolvency representatives to the courts of other Contracting States and cooperation and coordination between the various procedures for insolvency of corporate groups;

(c) The starting point for the elaboration of an international convention would be the articles of the UNCITRAL Model Law and its Guide to Enactment and Interpretation, which could be combined with the recommendations contained in the UNCITRAL Legislative Guide, including the provisions of part three relating to the treatment of enterprise groups in insolvency. These preliminary works for the

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<sup>4</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 259.

<sup>5</sup> The Working Group may wish to recall that throughout the preparatory work for the Model Law, the drafters proceeded on the assumption that the final text would be a model law rather than a convention. One reason for this approach was the close relationship between insolvency law and national judicial and civil procedure laws, which varied greatly from State to State. A second reason was the desire to complete the work in 1997; there was a general recognition at the thirtieth session of the Commission in 1997 when the Model Law was finalized that negotiation of a treaty would require more work, was technically much more difficult than a model law and the resulting text would not only prove difficult to accept, requiring a more complicated adoption procedure, but would not provide any short term improvement in the cross-border insolvency situation. The International Bar Association, in particular, noted the lack of success to date in achieving broad multilateral treaties in the area of cross-border insolvency and that "prospects for adopting legislation that would genuinely improve the real world of cross-border insolvency lay in model legislative provisions" (UNCITRAL Yearbook Vol. XXVIII: 1997, Part Three, para. 41, p. 341). Other delegates felt that adoption of the model provisions should precede any consideration of the feasibility of preparing a treaty. In adopting the Model Law, the Commission decided that it should evaluate the impact of, and its experience with, the Model Law before making a decision to draft a treaty (UNCITRAL Yearbook Vol. XXVIII: 1997, Part Two, para. 20, p. 47). No further action has been taken in that regard to date.

convention could be considered in conjunction with other reference texts on the subject, such as the European Council (EC) Regulation No. 1346/2000 of 19 May 2000 on insolvency proceedings, which has proven to be extremely useful and effective in the European Union;

(d) The degree of consensus in Working Group V on UNCITRAL texts already adopted in the field of cross-border insolvency has facilitated the creation of an *opinio juris* required for the development of an international convention;

(e) Particularly in the international context, the approach of soft law has reached its limits of effectiveness. The global crisis has shown that binding legal instruments are needed to provide greater assurance and legal certainty in cross-border insolvency situations, especially in proceedings involving international enterprise groups; and

(f) While Working Group V of UNCITRAL is the most competent and appropriate international body to take up the development of this international convention, cooperation and coordination with other international and regional expert organizations, such as the Hague Conference on Private International Law and with the European Commission, would be required.

12. The proposal by the UIA has been supplemented by a proposal by the International Insolvency Institute (III) on the specific question of choice of law in cross-border bankruptcy cases, which raises the following additional points.

13. A harmonized approach to choice of law issues in cross-border insolvency cases has the potential to significantly improve the coordination of liquidation and rescue of cross-border enterprises. Key topics that might be addressed first could be applicable law for ranking unsecured claims or choice of law for intellectual property or other intangible property rights. These issues have been raised in many cross-border insolvency cases and serious problems in the consistency and predictability of approaches persist. Although short of harmonizing substantive insolvency rules, harmonization of choice of law rules in cross-border insolvency cases would result in increased consistency, certainty, and predictability and improve and rationalize the content of the relevant choice of law rules.

14. Such work could complement UNCITRAL's ongoing project to improve the coordinated administration of cross-border cases as reflected in the UNCITRAL Model Law and the UNCITRAL Legislative Guide. Broad deference to the law of the debtor's COMI may facilitate coordinated governance by centralizing the administration and governance of an insolvency case, but also has the potential to export loss allocation policies across national borders. A broad scope for the application of local law may frustrate the administration of an insolvency case, but limits the extent to which the choice of insolvency forum will disrupt the nationally determined entitlements. Possible approaches might seek to distinguish "procedural" insolvency rules from those that affect substantive entitlements, or to identify particular matters where local interests dominate.

15. The work might first explore when the law of the forum would conclusively determine the governing insolvency principles (whether that forum was a main or non-main proceeding). It might then consider when the forum court in a non-main proceeding should apply the insolvency law of the main proceeding and identify other circumstances where a forum court might defer to the insolvency law of another jurisdiction (whether or not a proceeding was pending in that other jurisdiction). Ordinary private international law principles might continue to govern questions of non-insolvency law such as the validity or non-validity of claims.

16. This work could interact with and reinforce the work to be undertaken on the application of COMI to enterprise groups. It could also facilitate the adoption of the Model Law and its underlying principles. To the extent that the law of the main forum determines the law for the group, coordination is facilitated. Narrower application may minimize the extent to which local entitlements and policies are displaced and encourage cooperation, but may make coordination more difficult. While it is suggested that UNCITRAL is uniquely situated to undertake such a project, given its

experience and expertise in the area of insolvency law, work on this topic could be conducted in coordination with other international organizations with expertise in the area of choice of law, such as the Hague Conference on Private International Law.

## C. Insolvency of large and complex financial institutions

### 1. UNCITRAL references

A/CN.9/WG.V/WP.93/Add.5

A/CN.9/709

A/CN.9/WG.V/WP.109

A/CN.9/WG.V/WP.118

### 2. Background

17. At its forty-third session (2010), the Commission discussed a proposal by the Delegation of Switzerland to study the feasibility of developing an international instrument regarding the cross-border resolution<sup>6</sup> of large and complex financial institutions (A/CN.9/WG.V/WP.93/Add.5 and A/CN.9/709, para. 5). It was agreed that the Secretariat should prepare a comprehensive report on all or any of a number of issues.<sup>7</sup>

18. A first note prepared by the Secretariat focuses on paragraph (c) of the proposal and outlines the work undertaken (and ongoing) by international organizations (namely the Financial Stability Board (FSB), Basel Committee on Banking Supervision (BCBS) and the International Monetary Fund (IMF)), and regionally in the European Union. It also considers the relationship between that work and the completed work of UNCITRAL, both in the cross-border field and as it relates to enterprise groups. It does so against the backdrop that financial institutions are currently excluded from the scope of all relevant instruments adopted by UNCITRAL. A second note by the Secretariat, providing updated information on the work reported in the first paper has been prepared for the forty-fourth session of the Working Group (A/CN.9/WG.V/WP.118).

19. The first note highlights in particular the practical relevance of the “Key Attributes of effective resolution regimes for financial institutions” (Key Attributes)<sup>8</sup> developed by the FSB and endorsed by the G20 in 2011.<sup>9</sup> The Key Attributes seek to establish international standards for effective resolution regimes and encourage international convergence, calling for legislative changes in many jurisdictions in order to implement them. Key Attribute 7.5 contains a specific rule on cross-border recognition and cooperation, which includes the following language:

<sup>6</sup> Where “resolution” means the restructuring of an institution in order to ensure the continuity of its essential functions, preserve financial stability and restore the viability of all or part of that institution.

<sup>7</sup> These issues included: “(a) Identify the issues relevant for and particular to the winding down of large and complex financial institutions; (b) Establish a comparative study of selected legal orders in respect of mechanisms to ensure cooperation across borders in the course of a winding down of large and complex financial institutions; (c) Establish and summarize the work undertaken or being undertaken by other institutions, as well as the contents of any such work in this area; (d) Identify areas and legal issues where the principles established in the 2004 UNCITRAL Legislative Guide on Insolvency Law and the 1997 UNCITRAL Model Law on Cross-Border Insolvency could or should be applied directly or by analogy; (e) Identify possible alternative approaches for facilitating and ensuring cooperation across borders in the course of a winding down of large and complex financial institutions; (f) Issue recommendations in respect of possible future work by UNCITRAL or other bodies as well as national legislators or regulating authorities in the fields identified.”

<sup>8</sup> [www.financialstabilityboard.org/publications/r\\_111104cc.pdf](http://www.financialstabilityboard.org/publications/r_111104cc.pdf) (07/10/2013).

<sup>9</sup> Building on this decision, the G20 Leaders’ Declaration of 6 September 2013 stated: “We renew our commitment to make any necessary reforms to implement fully the FSB’s Key Attributes [...]. We will undertake the necessary actions to remove obstacles to cross-border resolution [...]” [www.g20.org/documents/\(07/10/2013\)](http://www.g20.org/documents/(07/10/2013)), para. 68.

“Jurisdictions should provide for transparent and expedited processes to give effect to foreign resolution measures, either by way of a mutual recognition process or by taking measures under the domestic resolution regime that support and are consistent with the resolution measures taken by the foreign home resolution authority. Such recognition or support measures would enable a foreign home resolution authority to gain rapid control over the firm (branch or shares in a subsidiary) or its assets that are located in the host jurisdiction, as appropriate, in cases where the firm is being resolved under the law of the foreign home jurisdiction. [...]”

20. Despite the widely acknowledged relevance of the issue, no concrete steps with tangible results have been taken so far to further develop such a legal framework at a global level. At a regional level, the EU Winding-up Directive<sup>10</sup> provides for the mutual recognition and enforcement in all EU Member States of decisions concerning the reorganization or winding up of banks and insurance undertakings having branches in Member States other than those in which they have their head offices. Also, the draft EU Recovery and Resolution Directive<sup>11</sup> provides for a recognition mechanism between the EU and third countries in the future.

21. The disorderly dismantling of financial institutions has proven to cause significant damage to States’ economies. As an effective cross-border resolution mechanism has the potential to limit such damage in the future, devising such a mechanism at a global level seems highly desirable. That mechanisms should provide a legal framework enabling jurisdictions to give effect to foreign resolution measures concerning distressed financial institutions. Other issues of cross-border coordination among supervisory authorities, as well as regulatory particularities applying exclusively to systemically important financial institutions (SIFIs), should be left outside the scope of any future instrument. A non-binding instrument in the form of a model law or recommendations as part of (or as an addendum to) a legislative guide might be the most appropriate approach in order to achieve consensus.

22. It is suggested that since UNCITRAL has some 20 years of experience in cross-border insolvency issues and its legislative expertise and working methods have stood the test of ambitious topics that are both technically challenging and politically sensitive, it seems to be the body best suited to devise a legal framework for the cross-border resolution of financial institutions. Work undertaken on this topic may be based upon UNCITRAL’s previous projects, as well as on work by other institutions and involve close coordination and cooperation with other international expert bodies.

## **D. Obligations of directors of enterprise group companies in the period approaching insolvency**

### **1. UNCITRAL references**

A/CN.9/WG.V/WP.115

UNCITRAL Legislative Guide on Insolvency Law, part four

### **2. Background**

23. Part four of the UNCITRAL Legislative Guide, which was adopted by the Commission in 2013, addresses the obligations of directors of a single entity in the period approaching insolvency. It does not address the application of those obligations in the enterprise group context.

<sup>10</sup> Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganization and winding up of credit institutions, available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0024:EN:NOT>.

<sup>11</sup> Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms, <http://register.consilium.europa.eu/pdf/en/13/st11/st11148-re01.en13.pdf> (07/10/2013).

24. At its forty-second session (2012), the Working Group considered issues relating to directors of enterprise group members (A/CN.9/763, para. 92). It was agreed that although the topic raised difficult and complex issues, particularly in the nexus of insolvency and corporate law, once the Working Group had completed its consideration of those issues in the context of individual companies, the possibility of further work in this area should be given serious consideration. Information concerning the manner in which national legal regimes treated directors' obligations was provided for the forty-third session (2013) of the Working Group (see A/CN.9/WG.V/WP.115).

25. Since much of modern business is conducted through enterprise groups, which often require directors to balance the interests of their own company with those of the group as a whole, it may be appropriate to consider the impact of the enterprise group structure on the obligations set out in part four of the Legislative Guide. A different approach might be required, one that is moderated, for example, by acknowledging the existence of the group, its structure, and the realities of its daily operations — in other words, an approach that takes account not only of the best interests of the individual constituent entities of the group, but also of how those interests fit within the interests of the group enterprise as a whole, and achieves a balance between those two considerations.

## II. Topics for possible future work

### A. Issues relating to creditors and claims

#### 1. Global standards for claims adjudication

##### (a) Background

26. The existing inconsistency among procedures in different jurisdictions creates uncertainty for debtors and creditors alike (especially where more than one jurisdiction may be available for a particular claims dispute), difficulty for judges and practitioners, and doubts about the enforceability (and recognizability) of a judgement from a court in one jurisdiction in another jurisdiction that follows a different standard. The issue has been a major consideration in large, multi-jurisdictional insolvency proceedings like that of Lehman Brothers.

27. Working toward a global, standard process would foster efficiency and certainty in insolvency matters worldwide and in the global restructuring and insolvency industry.

#### 2. Ranking of creditors' claims<sup>12</sup>

##### (a) UNCITRAL references

UNCITRAL Legislative Guide on Insolvency Law, part two, chapter V, paragraphs. 62-79 and recommendations 189 and 190

##### (b) Background

28. Standardized guidelines for ranking claims of different character and the treatment of "unusual" creditors (e.g., pension funds, employees, deposit insurance funds) would assist in the adjudication of bankruptcy and insolvency matters. There currently is no consistency in this area among countries — in fact, some countries grant extraordinary rights to certain "unusual" creditors that significantly alter the "waterfall" priority schemes that would otherwise apply (and still do apply in other countries).

29. Political factors in some jurisdictions may make it unlikely that a completely uniform global standard could be adopted; nonetheless, developing general guidelines

<sup>12</sup> This topic is proposed by INSOL International.

would help to instil greater certainty in bankruptcy and insolvency proceedings and to protect against creditors' rights varying wildly from jurisdiction to jurisdiction.

### 3. Relative voting rights of debt and equity holders<sup>12</sup>

#### (a) UNCITRAL references

UNCITRAL Legislative Guide on Insolvency Law, part two, chapter IV, paragraphs 26-55 and recommendations 145-151

#### (b) Background

30. Voting rights of debt and equity holders on a reorganization plan differ significantly between some jurisdictions and may lead to forum-shopping and uncertain enforceability of those plans from jurisdiction to jurisdiction. In particular, when one country's insolvency scheme permits a "cram down" non-consensual reorganization (i.e., over the dissenting vote of a class of creditors or equity holders), and another country's does not, the question of whether a reorganization plan based on that scheme should be recognized by a court in the other country may be a significant question in certain multinational insolvency proceedings. In addition, when one country's insolvency regime does not distinguish between the voting rights attached to the debt claims of third-party creditors and those of insiders, and another country's does, the question of whether a reorganization should be recognized by a court in the other country likewise may be a significant one.

31. In the recent cross-border case of *In re Vitro S.A.B. de C.V. (Vitro, S.A.B. de C.V. v. ACP Master, Ltd)*, the United States court found that several provisions in a confirmed Mexican reorganization plan that extinguished the note holders' claims against non-debtor subsidiaries and against guarantors of the notes were manifestly contrary to fundamental policies of the United States regarding protection of third-party claims in the context of insolvency. While the Mexican proceedings were recognized as foreign proceedings under the legislation implementing the UNCITRAL Model Law in the United States (chapter 15 of the Bankruptcy Code), the court declined to enforce the reorganization plan on the basis that it deviated from fundamental public policies of the United States.

32. Guidance as to appropriate guidelines for relative voting rights (and the deference to be afforded another jurisdiction's scheme) could avoid disputes over difficult questions in some insolvency proceedings.

### 4. Coordinating creditor access to information and collective representation<sup>13</sup>

#### (a) UNCITRAL references

UNCITRAL Legislative Guide on Insolvency Law, part two, chapter III, paragraphs 75-115 and recommendation 126-136

#### (b) Background

33. One goal that is shared among insolvency regimes is maximizing creditor recoveries. A related goal is providing creditors with access to information so that they may participate in the case and protect their individual interests and the interests of similarly situated creditors. While some creditors may have access to an insolvency representative locally, creditors that are geographically distant from the local proceeding may not have such access or the knowledge as to how to gain access to the case, the representative or information about the status of the case. Additionally, in some jurisdictions, the representative may not be required to communicate with creditors, making the process appear opaque. A number of jurisdictions have a well-established approach through the appointment of official committees of creditors to represent the collective interests of unsecured creditors or other types of collective representation, albeit with different guidelines for the appointment of creditors to

<sup>13</sup> This topic is proposed by the International Women's Insolvency and Restructuring Confederation (IWIRC).

such committees. In the case of concurrent proceedings for the same debtor or related cross-border proceedings for members of an enterprise group, while the UNCITRAL Model Law addresses cooperation between the courts and between foreign representatives, it does not address cooperation between creditor representatives (official or unofficial). Recommendations 126-136 of the UNCITRAL Legislative Guide, which address the participation of creditors in insolvency proceedings, have been followed in only a limited number of insolvency laws. A coordinated approach to creditor access and, where appropriate, collective representation could ensure the free flow of information, encourage creditor participation and maximize recovery as well as transparency.

34. Working Group V might consider developing a coordinated approach to creditor access to insolvency representatives with the goal of maximizing creditor access to information and participation. That work could expand upon recommendations 126-136 of the UNCITRAL Legislative Guide or possibly be developed into a best practices guide. It might also be included in the Guide to Enactment and Interpretation of the UNCITRAL Model Law in the paragraphs addressing cooperation under article 27. Alternatively, this issue could be addressed as part of future work on the insolvency of enterprise groups.

## **B. Insolvency treatment of financial contracts and netting<sup>14</sup>**

### **1. UNCITRAL references**

UNCITRAL Legislative Guide on Insolvency Law, part two, chapter II, paragraphs 208-215 and recommendations 71, 92 and 101-107

### **2. Background**

35. An efficient legal treatment of financial contracts is essential for the proper functioning of the financial markets. It is regarded as imperative that there be certainty as to what happens when one of the parties to such contracts fails to perform, including for reasons of insolvency, and it is generally thought that such contracts should receive special treatment and protection in the event of insolvency. However, such special treatment may conflict with other objectives of insolvency law. Additionally, the global financial crisis showed that the approach of isolating financial contracts from the effects of the insolvency process is not exempt of controversy.

36. The traditional protective approach to financial contracts is also taken by the UNCITRAL Legislative Guide. The Legislative Guide (a) exempts financial contracts (broadly defined) from the operation of any stay imposed on the termination of contracts or of any limitations on the enforceability of contract clauses that automatically terminate or accelerate a contract upon commencement of insolvency proceedings (*ipso facto* rules); (b) further exempts such contracts of any limitations on the exercise of set-off rights and netting upon commencement of insolvency proceedings; (c) limits the application of avoidance rules in this regard; and (d) exempts security interests to obligations arising out of financial contracts from any stay that applies to the enforcement of a security interest. These exemptions apply whether or not one of the counterparties to the contract is a financial institution (see recommendations 71, 92, 101-107). The main rationale offered by the Legislative Guide for these exemptions is the reduction of systemic risk that could threaten the stability of financial markets and that may be the outcome if debtors are allowed to “cherry-pick” contracts by performing some and breaching others and if there is legal uncertainty regarding the effect of insolvency upon financial contracts.

37. It seems timely to re-examine this axiom, taking stock of the experience brought by the financial crisis and the accumulated practice in different legal regimes applying safe harbours for financial contracts. An important development that might affect this issue is the evolving standard for regimes governing the resolution of financial

<sup>14</sup> This topic is proposed by the World Bank.



institutions. These standards include certain restrictions upon the operation of rights under financial contracts so that they do not hamper the effective implementation of resolution measures (see Financial Stability Board, Key Attributes of effective resolution regimes for financial institutions, Part 4 and Annex IV;<sup>15</sup> see also Unidroit Principles on the Operation of Close-out Netting Provisions, Principles 7 and 8<sup>16</sup>). Insolvency exemptions afforded to financial contracts that are applied broadly might be counterproductive in other restructuring contexts as well.

38. In the context of the UNCITRAL Legislative Guide, the key question might be whether it strikes a proper balance between the preservation of the net social benefit of financial contracts and the reduction of the potential harmful effect of immunizing such contracts from various insolvency rules. In this respect, the specific implications of the special treatment afforded to financial contracts in the event of insolvency might be considered, including:

- (a) The risk that creditors who are not true financial counterparties side step the insolvency process;
- (b) Possible disincentives to monitor the credit strength of trading partners;
- (c) The potential incentive to frame transactions as financial contracts and obtain a de facto undisclosed security interest;
- (d) The potential unfairness to the general body of creditors (i.e. inequitable distribution of insolvency loss) and harm to the estate;
- (e) The risk of abuse of the insolvency process by “empty creditors” (whose economic interests diverge from their right to vote their claim) and potential harm to restructurings attempts; and
- (f) The risk of expansion of exemptions beyond their intended scope.

## C. Regulation of insolvency practitioners<sup>12</sup>

### 1. UNCITRAL references

UNCITRAL Legislative Guide on Insolvency Law, part two, chapter III, paragraphs 36-43 and 48 and recommendations 115-117

### 2. Background

39. In 2007, the European Bank for Reconstruction and Development (EBRD) identified a set of principles to guide lawmakers in setting standards for the qualifications, appointment, conduct, supervision and regulation of insolvency office holders. These Insolvency Office Holder Principles<sup>17</sup> seek to advance the integrity, fairness and efficiency of the insolvency law system by ensuring that appropriately qualified professionals hold office in insolvency cases. These guidelines provide a checklist of most of the major issues which should be reflected in any insolvency law regime that provides for the appointment of an office holder in insolvency or reorganization cases: to this extent they are not intended to be exhaustive. As such, they build on the relevant provisions of the UNCITRAL Legislative Guide and the World Bank Principles for Effective Insolvency and Creditor Rights Systems,<sup>18</sup> by providing greater detail and guidance on the application of the standards advanced by those institutions.

<sup>15</sup> Available from [www.financialstabilityboard.org/publications/r\\_111104cc.pdf](http://www.financialstabilityboard.org/publications/r_111104cc.pdf).

<sup>16</sup> Available from [www.unidroit.org/english/governments/councildocuments/2013session/cd92-06a-e.pdf](http://www.unidroit.org/english/governments/councildocuments/2013session/cd92-06a-e.pdf).

<sup>17</sup> Available from [www.ebrd.com/downloads/legal/insolvency/ioh\\_principles.pdf](http://www.ebrd.com/downloads/legal/insolvency/ioh_principles.pdf).  
[www.google.at/search?q=EBRD+Insolvency+Office+Holder+Principles&rls=com.microsoft:en-gb:IE-SearchBox&ie=UTF-8&oe=UTF-8&sourceid=ie7&rlz=117GGHP\\_en-#](http://www.google.at/search?q=EBRD+Insolvency+Office+Holder+Principles&rls=com.microsoft:en-gb:IE-SearchBox&ie=UTF-8&oe=UTF-8&sourceid=ie7&rlz=117GGHP_en-#).

<sup>18</sup> World Bank Principles for Effective Insolvency and Creditor Rights Systems, available from <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/LAWANDJUSTICE/GILD/0,,pagePK:181022~theSitePK:215006,00.html>.

40. Despite the differences of legal systems, insolvency office holders, variously called trustees, administrators, receivers, liquidators, insolvency representative, are a critical aspect of the institutional capacity that determines the effectiveness and efficiency of most insolvency systems around the world. They are required to act honestly, professionally and responsibly. They are usually given control over assets and significant authority to decide how and when assets are managed, realized and distributed. A properly qualified, trained and regulated cadre of office holders is essential for the transparent, effective and efficient functioning of these systems. Assessments and surveys demonstrate, however, that many insolvency law regimes are lacking the core elements necessary for the proper functioning of such a system.

41. Consideration could be given to developing these Principles for international application.

## D. Enforcement of insolvency-derived judgements<sup>12</sup>

### 1. UNCITRAL references

UNCITRAL Model Law on Cross-Border Insolvency, article 21 and Guide to Enactment and Interpretation, paragraphs 189-195

UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective (2012 version), paragraphs 138-146

CLOUT case no. 1270: *Rubin v Eurofinance SA*

### 2. Background

42. In *Rubin v Eurofinance SA*,<sup>19</sup> the foreign representatives of the debtor company sought, in addition to recognition of the foreign proceedings, enforcement of a judgement issued by the United States Bankruptcy Court against third parties for a payment due to the creditors of the debtor company. On an appeal against a decision of the Court of Appeal that the judgement could be enforced, the English Supreme Court addressed the principal issue of whether the recognition and enforcement of judgements given in the course of insolvency proceedings (e.g. judgements in transaction avoidance proceedings) were subject to the traditional common law rules governing the recognition of *in personam* and *in rem* judgements, or whether different rules applied to insolvency judgements. The court found that different rules did not apply and that the Cross-Border Insolvency Regulations 2006 (CBIR) (enacting the Model Law in Great Britain) did not provide for recognition and enforcement of foreign judgements against third parties. The court said that it would be surprising if the Model Law was intended to deal with judgements in insolvency matters by implication. Articles 21, 25 and 27 of the UNCITRAL Model Law were concerned with procedural matters and while there was no doubt they should be given a purposive interpretation and be widely construed in the light of the objects of the Model Law, the court said there was nothing to suggest that they applied to the recognition and enforcement of foreign judgements against third parties. The court went on to observe that the Model Law was not designed to provide for the reciprocal enforcement of judgements.

43. Thought might be given as to whether the UNCITRAL Model Law should specifically cover the enforcement of insolvency-derived judgements as part of the heads of discretionary relief available under article 21. Consideration might also be given as to whether the standard text of the Model Law should include something along the lines of “proceedings concerning the adjustment of debt” in the definition of “foreign proceedings” to mirror proposed changes to the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings, as well as the manner in which the Model Law has been enacted in some States. Such a revision would assist with the cross-border recognition of voluntary restructuring agreements.

<sup>19</sup> [2012] UKSC 46 (on appeal from [2010] EWCA Civ 895 and [2011] EWCA Civ 971); CLOUT case no. 1270.

## **E. Treatment of intellectual property contracts in cross-border insolvency cases<sup>20</sup>**

### **1. UNCITRAL references**

UNCITRAL Legislative Guide on Insolvency Law, part two, chapter II, paragraph 115

UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property (2011)

### **2. Background**

44. The UNCITRAL Legislative Guide notes that an exception may be required for the treatment of intellectual property licences in connection with the continuation, rejection and termination of contracts,<sup>21</sup> but does not treat that issue in any depth or offer any recommendations. In light of recent developments involving intellectual property in insolvencies, and the increasing importance of intellectual property as assets of insolvent enterprises, the treatment of intellectual property assets in insolvency proceedings might be examined in depth and particularized guidelines developed.

45. Intellectual property contracts are increasingly important in commercial activities and, consequently, are often integral components of the assets dealt with in an insolvency proceeding. In cases such as those involving the Nortel Networks Corporation and the Eastman Kodak Company, the intellectual property rights of the debtors constituted their largest assets. The treatment of these intellectual property rights often involves important considerations that differ from those underlying the treatment of other forms of contracts. While the rules governing the termination, continuation and assignment of ordinary contracts are often dictated by the sound business judgement of the insolvency representative, the creditors and the court, the treatment of intellectual property contracts may have wider ramifications.

46. The differing approaches to these issues were highlighted by the insolvency proceeding of Qimonda AG.<sup>22</sup> Qimonda is a German producer of DRAM chips for computers which operated globally and held over 12,000 patents. Qimonda had entered into numerous patent cross licensing agreements with counterparties. In January 2009, Qimonda commenced insolvency proceedings in Germany and under German insolvency law the intellectual property licences of Qimonda as licensor were terminated. Similar treatment of intellectual property licences occurs in other countries, including Italy, where intellectual property licences were terminated in the insolvency proceedings concerning the company think3. When Qimonda's insolvency representative filed an application under chapter 15 of the United States Bankruptcy Code (enacting the UNCITRAL Model Law in the United States) seeking enforcement of the termination of the intellectual property licences, the United States court determined that the relief sought was "manifestly contrary" to the public policy of the United States of technological innovation and noted the "patent thicket" which permeates the semiconductor industry. This case highlights the inconsistencies between the treatment of intellectual property contracts under various regimes and creates confusion regarding the application of the UNCITRAL Model Law.

47. While termination of contracts can be advantageous for creditors of an insolvent debtor and is permitted in many countries, the termination of intellectual property contracts can have far reaching ramifications. For example, if an insolvent patent licensor terminates a patent licence for a process to make semiconductors it could bring to a halt production in a billion dollar factory of the licensee and create a worldwide shortage for manufacturers who use the product in their own devices. This cascading effect of termination has led certain countries to provide protection for the continued use of intellectual property by licensees.

<sup>20</sup> This topic is proposed by the International Insolvency Institute (III).

<sup>21</sup> See for example, Legislative Guide, part two, chapter II, para. 115.

<sup>22</sup> *Re Qimonda AG Bankr. Lit.*, 433 B.R. 547; 462 B.R. 165 (2011); Clout case no. 1213.

48. Conversely, while an insolvent debtor is able to continue and assign intellectual property licences in some countries where the debtor is the licensee, in others the non-debtor licensor can terminate such contracts. With the increasing importance of intellectual property licences to the rehabilitation of insolvent entities, the ability of an insolvent licensee to continue, and potentially sell or assign, the intellectual property rights has become a significant factor in insolvency proceedings. Additional complications arise when the licence involves trademarks and other forms of intellectual property where the intellectual property law contemplates continuing involvement by both parties to the contract. Further complications arise when the intellectual property is linked to the performance of personal services such as exists in franchising arrangements. Policy issues such as the ability to cure non-monetary defaults and assurance of continued performance by the debtor or an assignee also require examination.

49. The work could include a comparative analysis of the treatment of intellectual property licences in insolvency proceedings in various countries and the preparation of recommendations to harmonize the treatment of parties to those licences across different regimes. Issues involving the sale, termination, continuation, rejection and assignment of intellectual property contracts could be addressed. The conclusions reached would need to be coordinated with the goals of parties to intellectual property contracts in conventional commerce. The possibility of exceptions to the general rules regarding unperformed contracts is noted in the Legislative Guide but as noted above, no recommendations regarding the treatment of intellectual property contracts were included. The growing importance of these contracts to the proper functioning of insolvency proceedings suggests the need for a thorough examination of these issues and the preparation of consistent guidelines for the treatment of intellectual property contracts. The results of this examination might take the form of a supplement to the Legislative Guide, a model law or a statement of principles and should be coordinated with the efforts of other working groups and organizations dealing with intellectual property issues.

### **III. Expedited, simplified proceedings, including pre-packs and other mechanisms suitable for the insolvency of micro, small and medium-sized enterprises**

#### **1. UNCITRAL references**

A/CN.9/780 (Report of an UNCITRAL colloquium on microfinance held on 16-18 January 2013)

*Official Records of the General Assembly, Sixty-eighth Session, Supplement No.17, (A/68/17), paragraphs 316-322 and 326*

#### **2. Background**

50. UNCITRAL has conducted two colloquia in the area of microfinance and the creation of an enabling legal environment for micro, small and medium-sized enterprise (MSMEs). At its forty-sixth session (2013), the Commission considered the work undertaken on those topics and in particular the results of the colloquium held from 16-19 January 2013. The Commission agreed that work on international trade law aimed at reducing the legal obstacles faced by MSMEs throughout their life cycle and, in particular those in developing economies, should be added to its work programme. The Commission also agreed that work should start with a focus on the legal questions surrounding the simplification of incorporation and that the Secretariat should prepare documentation as a prerequisite to the early convening of the session of a working group. Working Group I, which has been given the work on that topic, will hold its first meeting from 10-14 February 2014 in New York.

51. At its forty-sixth session, the Commission also discussed issues related to the insolvency of MSMEs and requested Working Group V to conduct, at its session to be held in the first half of 2104, a preliminary examination of relevant issues, and in

particular to consider whether the UNCITRAL Legislative Guide provided sufficient and adequate solutions for such enterprises. If it did not, the Working Group was requested to consider what further work and potential work product might be required, as noted above, to streamline and simplify insolvency procedures for such enterprises. Its conclusions on those issues should be included in its progress report to the Commission in 2014 in sufficient detail to enable the Commission to consider what future work might be required, if any.<sup>1</sup>

52. For a number of reasons, MSMEs typically face issues in the event of financial difficulty that larger enterprises do not. These reasons include:

(a) An excessive burden of risk connected to a scarcity of working capital. This situation is also connected to the decline in equity finance, increased rates of rejected applications for finance, higher interest rate spreads and larger collateral requirements;

(b) A centralized governance model in which ownership and control (often within a family) overlap. Accordingly, management is frequently unable or unwilling to approach a financial crisis in a timely manner and request the opening of insolvency proceedings. Family ownership often means that the management refuses to accept an insolvency solution that could result in their loss of control over the business. An owner will sometimes hide a crisis out of fear of damaging a good commercial name, relationships with employees, suppliers and the market and disrupting existing lines of credit. Even in those cases where the family/individually owned MSMEs is incorporated, creditors will often be unable to see the true economic state of the enterprise. These factors may mean the crisis only becomes apparent when it is too great to hide and the enterprise has passed the point where there is no way to prevent the loss of its economic value. When small business owners look for informal solutions, they frequently lack the necessary experience to find an appropriate solution and the necessary specialized professional assistance may be too expensive;

(c) The size of the enterprise may mean that it is too small to benefit from the formal reorganization and liquidation procedures available under the insolvency law, especially where such procedures were designed for larger enterprises and are inappropriate for dealing with the essentially individual nature of many of these enterprises. At the same time, the insolvency procedures for natural persons are not designed to deal with the financial difficulties of enterprises of an industrial or commercial nature, however small. Generally these types of procedures for natural persons are established to solve problems related to consumer debt settlement and fail to take account of the commercial scope of the enterprise, which if salvaged might be able to carry on its activities to satisfy its creditors.

53. There is general agreement that an insolvency regime for MSMEs might draw from both the regimes regulating the insolvency of larger enterprises and those regulating the insolvency of natural persons. It should aim to maximize the assets and preserve the going concern of the enterprise on one hand, and provide a discharge and a fresh start on the other. At the same time, an insolvency regime for MSMEs needs to take into consideration the social and economic culture of a country, particularly with respect to the definition of MSMEs in that jurisdiction. For incorporated entities, however small, it should be possible to assure continuity. For individuals operating without the protection of incorporation (this category includes also partnerships where the partners are liable for the enterprise's debts), continuity is more difficult to achieve. However, a balance between the interests of the different stakeholders is required and punitive approaches should be avoided.

54. Experience suggests that while many insolvency laws may provide flexible and effective instruments for the survival of reversible business crises, they do not yet include procedures for smaller and micro enterprises. Insolvency laws may set arbitrary thresholds for entry into insolvency procedures by reference to, for example, amounts of debt, that will preclude the smaller enterprises. Those enterprises that are slightly larger than the thresholds may also be unable to find adequate solutions, as banks and financial institutions may be unwilling to finance their reorganization or restructuring. MSME financing may be available only when the ownership can

provide sufficient collateral; for financial creditors it may be more important to recover their claims through the sale of collateral than to finance an enterprise's rescue.

55. Some States, for example Italy, have enacted laws to deal with the insolvency of natural persons that include both consumers and small enterprises. While the Italian law provides for both an agreement with creditors and for liquidation with a discharge, the complexity of the procedure, the associated costs, the conditions applying to discharge and the time required to obtain a discharge operate as disincentives to use of the law.

56. The goals of an MSME insolvency regime should include encouraging debtors to file for the opening of insolvency proceedings when necessary; incentivizing financial institutions to actively participate in the process; providing simplified procedures for reorganization and liquidation, with shorter time-frames, lighter evidentiary requirements, fewer procedural steps and, if possible, fewer appeals; and providing a discharge and a fresh start for individual entrepreneurs.

**C. Note by the Secretariat on recent developments concerning the  
global and regional initiatives regarding the insolvency of  
large and complex financial institutions**

(A/CN.9/WG.V/WP.118)

[Original: English]

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## Background

1. At its forty-third session in June 2010, the Commission discussed a proposal to study the feasibility of developing an international instrument regarding the cross-border resolution of large and complex financial institutions (A/CN.9/WG.V/WP.93/Add.5 and A/CN.9/709, para. 5). It was agreed that the Secretariat should prepare a comprehensive report on all or any of a number of issues.<sup>1</sup>

2. The Secretariat prepared a note (A/CN.9/WG.V/WP.109) that focused on paragraph (c) of that proposal and outlined the work that had been undertaken by international organizations and regionally in the European Union up to the end of July 2012. To some extent, paragraph (d) of the proposal was addressed in some of the work of international organizations noted in the paper.

3. This note focuses on the work that has been undertaken (and is ongoing) by the organizations covered in the first paper since the date of that paper. Reports referred to are listed in the annex to this note.

## I. Global initiatives: progress in the work of international organizations

### A. International Monetary Fund

4. In August 2012, the International Monetary Fund (IMF) published a policy paper which reviewed the implementation of the Financial Stability Board's Key

<sup>1</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 259. These issues included: (a) Identify the issues relevant for and particular to the winding down of large and complex financial institutions; (b) Establish a comparative study of selected legal orders in respect of mechanisms to ensure cooperation across borders in the course of a winding down of large and complex financial institutions; (c) Establish and summarize the work undertaken or being undertaken by other institutions, as well as the contents of any such work in this area; (d) Identify areas and legal issues where the principles established in the 2004 UNCITRAL Legislative Guide on Insolvency Law and the 1997 UNCITRAL Model Law on Cross-Border Insolvency could or should be applied directly or by analogy; (e) Identify possible alternative approaches for facilitating and ensuring cooperation across borders in the course of a winding down of large and complex financial institutions; (f) Issue recommendations in respect of possible future work by UNCITRAL or other bodies as well as national legislators or regulating authorities in the fields identified.

Attributes of effective resolution regimes for financial institutions (the Key Attributes).<sup>2</sup>

5. As a preliminary matter, the IMF's report pointed out that since the Key Attributes were not an international treaty, they did not give rise to binding obligations, but that implementation by all jurisdictions was to be widely encouraged. Moreover, it emphasized that while the Key Attributes represented an important step forward, gaps in the framework remained. One example cited was that the Key Attributes did not articulate principles that would guide burden-sharing between national authorities who might have to commit public funds to support the resolution of large cross-border institutions. Furthermore, implementation was uneven and significant political commitment would be required for many countries to amend their legal frameworks to comply with the Key Attributes.<sup>3</sup>

6. With respect to cross-border cooperation, the IMF identified several problems. Existing legal frameworks in many countries established objectives for national authorities that focused on the promotion of domestic financial stability and did not consider the impact of national resolution actions on financial stability in other jurisdictions. The legal frameworks in some countries failed to make adequate provision for local resolution authorities to support resolution actions taken by their foreign counterparts. In particular, the frameworks failed to provide an effective mechanism under which the authorities with respect to local branches of a foreign institution might give effect to the resolution actions taken by authorities in the home jurisdiction of that institution. The host authority should have resolution powers over local branches of foreign institutions and the capacity to use its powers to either support the home authority in its resolution action or, in exceptional circumstances, to initiate resolution measures either in the absence of home intervention or where the home authority acted in a manner that did not take sufficient account of the need to preserve the host jurisdiction's financial stability. The automatic triggering of a resolution action as a result of the commencement of an intervention action or insolvency proceeding in another jurisdiction was discouraged, except in accordance with the Key Attributes in cases where national action was required to achieve domestic stability in the absence of effective international cooperation and information sharing.

7. A further problem identified was that legal frameworks discriminated against foreign creditors, for example, through rules governing the distribution of proceeds that either explicitly or implicitly gave priority to local depositors and creditors. In addition to those problems, legal frameworks governing information sharing among the relevant home and foreign authorities effectively prevented the sharing of information, either before, or as part of, a resolution action, and greater inter-agency coordination and adequate protection of confidentiality were required.

8. For systemically important financial institutions (in particular, those of global significance or G-SIFIs) the Key Attributes establish a comprehensive procedural framework of resolvability assessments and recovery and resolution planning.<sup>4</sup> The Financial Stability Board (FSB) had established a timetable for developing recovery and resolution plans (RRP) by the end of 2012. Crisis Management Groups (CMGs) were then to conduct resolvability assessments for all G-SIFIs in the first quarter of 2013 and to develop basic resolution strategies. At the same time, institution-specific cooperation agreements were to be established for all G-SIFIs. Surveys conducted by the FSB indicated that CMGs had been established for nearly all G-SIFIs and recovery plans have been reviewed by national supervisory bodies.<sup>5</sup> Progress in the completion

<sup>2</sup> International Monetary Fund, *The Key Attributes of Effective Resolution Regimes for Financial Institutions — Progress to Date and Next Steps*. The Key Attributes are described in A/CN.9/WG.V/WP.109, paragraphs 14-25.

<sup>3</sup> IMF Progress Report, Executive Summary, p. 3.

<sup>4</sup> See A/CN.9/WG.V/WP.109, paras. 21 and 23.

<sup>5</sup> The Report of the Financial Stability Board to G20 Leaders, published in June 2012, indicated that, as of the second quarter of 2012, CMGs had been established for all but four of the 28 FSB designated G-SIFIs. Where a CMG is not yet established or active, substantive action has been planned. See [http://www.financialstabilityboard.org/publications/r\\_120619a.pdf](http://www.financialstabilityboard.org/publications/r_120619a.pdf).



of resolvability assessments and resolution plans was less advanced due to the lack of appropriate national resolution frameworks in many jurisdictions.

9. The IMF report notes that key areas identified by the FSB for action included more exhaustive analysis of the potential impediments to the implementation of recovery measures and intensified cross-border cooperation and information sharing.<sup>6</sup> With respect to the latter, concerns have been expressed by firms subject to the RRP process over inconsistent rules governing the treatment of confidential information across jurisdictions. Moreover, the IMF paper noted that national authorities may prove reluctant to cooperate with their foreign counterparts unless they have a high level of trust in their counterparts' ability to protect confidential information and to implement international resolution.

## **B. Financial Stability Board**

10. In November 2012, the FSB published a guideline concerning recovery and resolution planning, focussing on firm-specific cross-border cooperation agreements (COAGs).<sup>7</sup> The guideline aimed to establish a general framework for information sharing among the CMGs, and to plan, coordinate and implement resolution strategies between home and host authorities in a timely manner. In general, two approaches for these COAGs were proposed, namely, the single point of entry (SPE) and the multiple point of entry (MPE). The SPE applied the resolution powers at the holding or parent level of the group and usually the resolution authority in the jurisdiction in charge of the global consolidated supervision of the group could initiate the proceeding. Under that approach, the lower level operational subsidiaries were kept as going concerns and the host authorities were able to exercise their powers to support the resolution lead by the home authorities to the extent of their powers vis-à-vis the local subsidiaries. In contrast, the MPE applied the resolution to multiple parts of the group through two or more resolution authorities. The group would be treated in separate parts and coordination should be ensured by the home authority. Accordingly, the powers applied to the separate parts of the group could be different and, in certain circumstance, the application of a combined approach might be appropriate. The guideline outlined in detail how these approaches would be applied in practice and the different steps involved.

11. In April 2013, the Financial Stability Board completed a thematic peer review<sup>8</sup> focusing on the Key Attributes, the objective of which was to evaluate the existing resolution regimes and any revisions aimed at compliance with the Key Attributes. The review found that while a number of major jurisdictions had undertaken reform of their resolution regimes, implementation of the Key Attributes was still in its infancy and resolution regimes across FSB member jurisdictions exhibited a broad range of practices in terms of scope, mandate and the powers of authorities. Since the Key Attributes were silent on the form of the resolution regime or the type of the resolution authority required, jurisdictions had adopted diverse interpretations with respect to what constituted a "resolution regime" and its relationship to ordinary insolvency procedures and to supervisory measures. Such divergence made it difficult to draw definitive conclusions about the alignment of national powers across different sectors with the Key Attributes.

12. According to the main findings of the report, the powers available to resolve financial groups were relatively weak. Most jurisdictions lacked powers to take control of the parent or affiliates of a failed financial institution, particularly if the holding company or the operational affiliates were unregulated. When the powers

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<sup>6</sup> IMF Progress Report 2012, p. 19.

<sup>7</sup> Recovery and Resolution Planning: Making the Key Attributes Requirements Operational — Consultative Document.

<sup>8</sup> Thematic review on resolution regimes. The objectives of these reviews are to encourage consistent cross-country and cross-sector implementation; to evaluate (where possible) the extent to which standards and policies have had their intended results; and to identify gaps and weaknesses in reviewed areas and to make recommendations for potential follow-up (including via the development of new standards) by FSB members.

available with respect to the branches of a foreign financial institution were less comprehensive than those available for domestic institutions, the domestic authorities could only use those powers to support resolution action taken by the home authority rather than by exercising it independently. Further clarification of the resolution powers needed for those entities and for branches of foreign financial institutions was desirable.

13. National legal frameworks for cross-border cooperation were less well-developed than other areas of the Key Attributes. Only a few jurisdictions had legislated to empower and encourage their resolution authorities to cooperate and coordinate wherever possible with foreign resolution authorities and the ability to give effect to foreign resolution actions remained unclear. Very few jurisdictions had provisions for expedited (whether administrative or court-based) procedures for recognition and enforcement of actions taken by foreign authorities.

14. The establishment of information sharing mechanisms among home and host authorities had progressed slowly and very few jurisdictions had clear and dedicated statutory provisions for the sharing of confidential information with foreign resolution authorities. The cross-border exchange of information relied mainly upon existing supervisory channels and unless those resolution authorities charged with planning or carrying out the resolution were included in the arrangements, it would hinder the effectiveness of preparing the resolution strategies and of carrying out resolution. Although the existence of a memorandum of understanding between authorities was not a pre-condition for information sharing, in practice, it was suggested as being highly desirable.

15. With respect to financial contracts, the review found that resolution authorities in most jurisdictions either lacked powers to impose a temporary stay on the exercise of contractual acceleration or early termination rights in financial contracts that arose only because of entry into resolution or in connection with the exercise of resolution powers or, where the power existed, it was not subject to suitable safeguards.

16. While the equal treatment of creditors was also a focus, the review noted that the majority of jurisdictions did not treat creditors according to the location of their claim or the jurisdiction in which the claim was payable. Nevertheless, there was differential treatment of certain types of claims.

17. Based on the findings, certain recommendations were made for implementation by the FSB and its member jurisdictions. First, a continuing full implementation of the Key Attributes was required. For instance, the scope of resolution regimes needed to be extended to include financial holding companies, non-regulated operational entities and branches of foreign financial firms in order to facilitate the consistent resolution of a group. The mandates and capacity of resolution authorities in cross-border actions needed to be enhanced and domestic legal frameworks for information sharing required review or revision to ensure information exchange channels included all relevant home and host authorities involved in resolution. Additional clarification and guidance on the application of the Key Attributes was also required. For example, guidance on the nature of powers with respect to financial holding companies, non-regulated operational entities and branches of foreign financial firms should be developed; a mechanism to recognize foreign resolution measures, either through administrative, judicial or contractual means, should be established and its effectiveness in the implementation of cross-border resolution strategies evaluated. Finally, on-going implementation monitoring was required for cross-border cooperation and information sharing.

18. On 12 August 2013, the FSB published a number of documents, including a consultative document on information sharing for resolution purposes.<sup>9</sup> The draft guidance covers two issues, namely, principles on information sharing for resolution purposes and information sharing provisions for cross-border cooperation agreements (COAG). The first section addresses the principles for the design of legal gateways and related confidentiality regimes aimed at supporting information sharing for

<sup>9</sup> Information sharing for resolution purposes. The consultation closes on 15 October 2013.

resolution purposes with foreign and domestic authorities. The second section sets out principles on the provisions relating to information sharing that should be included in COAGs.

19. With respect to information sharing for resolution purposes, the principles require the establishment of clear legal gateways authorizing national authorities, including non-resolution authorities, to disclose information on a timely basis to other domestic and foreign authorities involved in the resolution of the entity to which the information related. The information, being commercially and legal sensitive, is susceptible to disclosure if necessary, however, disclosure is subject to any applicable requirements relating to data protection or banking secrecy and would be conditional on the recipient authority being subject to adequate confidentiality requirements. As to the use of the information, the legal gateways should not prevent or restrict the reasonable and effective use of the information by a recipient authority, however, for re-disclosure, the legal framework should be clear about the conditions under which information received from a foreign authority may be disclosed to another domestic or foreign authority. Where the legal gateways are conditional on reciprocity, they should establish criteria for determining comparability. With respect to authorities and their current and former employees and agents, the principles require a general protection against criminal and civil actions for breach of confidentiality based on the appropriate disclosure of information. Finally, the legal framework should exclude information received from foreign authorities from the application of freedom of information legislation or treat such information as falling within an existing exemption under that legislation.

20. Concerning information sharing in the context of firm-specific cross-border cooperation, the document indicated that the COAGs should specify basic requirements concerning information sharing, including the parties that might need to receive confidential information; the circumstance in which such information might be shared; the classes of information that might be shared; applicable confidentiality obligations and procedures; information sharing between authorities within the CMG; and the means of communicating information. The parties should also agree on how the information might be used and on issues of disclosure to third parties. These provisions of COAGs on information sharing should be reviewed regularly, in order to ensure the information sharing mechanism is up to date and consistent with resolution plans.

21. In addition to providing detailed guidance on the Key Attributes, the FSB expanded their application to include non-bank financial institutions. Another consultative document published on 12 August 2013<sup>10</sup> concerns the resolution of non-bank financial institutions, which includes financial market infrastructures (FMI) and their systemically important participants, insurers and financial firms that hold client assets. The document notes that while sector-specific resolution regimes should be consistent with the objectives and relevant requirements of the Key Attributes, not all of the powers and features of resolution regimes set out in the Key Attributes are relevant for all sectors. Different types of financial firms — even within a particular sector — have distinctive features that need to be taken into account in the manner in which the Key Attributes are applied. Resolution regimes for FMIs, for example, need to give particular priority to maintaining continuity of the critical functions that such infrastructures perform in financial markets and take account of loss allocation arrangements under the rules of certain kinds of FMIs; resolution regimes for insurers need to protect policyholder interests; and resolution regimes need to interact effectively with client asset protection rules, so that client assets could be rapidly transferred or returned in the resolution of a firm with holdings of client assets.

22. The purpose of the document is to provide guidance to assist jurisdictions and authorities with the implementation of the Key Attributes with respect to resolution regimes for these entities. Once finalized, these guidance notes would be submitted to the FSB for adoption as new annexes to the Key Attributes.

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<sup>10</sup> Application of the Key Attributes of Effective Resolution Regimes to Non-Bank Financial Institutions. The consultation closes on 15 October 2013.

### C. Committee on Payment and Settlement Systems, Bank for International Settlements

23. In April 2012, the Committee on Payment and Settlement Systems (CPSS) of the Bank for International Settlements, together with the International Organization of Securities Commissions (IOSCO), published the Principles for financial market infrastructures, which establish new international standards for payment, clearing and settlement systems, ensuring that these infrastructures operate safely and efficiently in normal circumstances and in times of market stress. The Principles require risk controls and contingency plans to be developed in order to safeguard the critical role played by FMIs and to preserve financial stability.

24. In July 2012, the CPSS and IOSCO published a consultative report<sup>11</sup> regarding the recovery and resolution of FMIs, which echoed the requirements established in the Key Attributes. As FMIs often operate in multiple jurisdictions, they might be subject to multiple resolution frameworks, established under different laws. The Key Attributes recommended jurisdictions provide transparent and expedited processes to give effect to foreign resolution measures, which could be satisfied either by mutual recognition processes or by taking measures under the domestic resolution regime that supported and were consistent with the resolution measures taken by the foreign resolution authority. Cooperation and coordination among or between those authorities, facilitated by the development of formal cooperation and communication protocols, could ensure fulfilment of their responsibilities during normal times and in times of crisis. Both the Key Attributes and the Principles address the importance of cooperation among domestic and host authorities, at the same time emphasizing the need to respect the responsibilities of each authority, in order to provide a clear regulatory picture for FMIs.

25. In August 2013, CPSS-IOSCO published a report on the recovery of financial market infrastructures.<sup>12</sup> The report provides guidance to financial market infrastructures such as central counterparties on how to develop plans to enable them to recover from threats to their viability and financial strength that might prevent them from continuing to provide critical services to their participants and the markets they serve. It also provides guidance to relevant authorities in carrying out their responsibilities associated with the development and implementation of recovery plans and tools. The report was produced in response to comments received on the July 2012 CPSS-IOSCO report on Recovery and resolution of financial market infrastructures that requested more guidance on what recovery tools would be appropriate for FMIs. The report supplements the CPSS-IOSCO Principles for financial market infrastructures (see above, para. 23), the international standards for financial market infrastructures (FMIs) published in April 2012.

## II. Regional approaches: the European Union

26. In October 2012, the European Commission published a consultation document<sup>13</sup> concerning the possible framework for the recovery and resolution of financial institutions other than banks, expanding the application of the Key Attributes. The document argued that these institutions, like banks, needed to be regulated in view of the public interest at stake, especially when those institutions experienced severe financial or operational difficulties that could lead to their failure. The document noted that the tools currently available to public authorities might not be sufficient to enable an orderly recovery or resolution of these difficulties and public funds might have to be expended to prop up ailing institutions.

<sup>11</sup> Recovery and resolution of financial market infrastructures. The consultation closed on 28 September 2012.

<sup>12</sup> Recovery of financial market infrastructures. The consultation closes on 11 October 2013.

<sup>13</sup> Consultation on a possible recovery and resolution framework for financial institutions other than banks. The consultation closed on 28 December 2012.

27. The document was directed firstly at ascertaining how and when the failure of a financial institution other than a bank could threaten financial stability, the financial institutions covered being FMIs, such as central counterparties (CCPs) and central securities depositories (CSDs), as well as systemic insurance companies. Secondly, the document considered what arrangements might be needed to prevent the failure of such institutions from compromising financial stability, focussing on extraordinary measure that might be necessary to contain the impact of failure rather than on the regulation necessary to mitigate the risks inherent in their businesses.

28. In late June 2013, the Council of the European Union agreed its position on a draft directive establishing a framework for the recovery and resolution of credit institutions and investment firms and called for the commencement of negotiations with the European Parliament with the aim of adopting a directive at first reading before the end of 2013.<sup>14</sup> The proposed directive<sup>15</sup> is aimed at providing national authorities with common powers and instruments to pre-empt bank crises and to resolve any financial institution in an orderly manner in the event of failure, while preserving essential bank operations and minimizing taxpayers' exposure to losses. The proposed directive is aimed at transposing into European Union law commitments made at the G20 summit in Washington DC in November 2008, when leaders called for a review of resolution regimes and bankruptcy laws "to ensure that they permit an orderly wind-down of large complex cross-border financial institutions."<sup>16</sup>

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<sup>14</sup> See [www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ecofin/137627.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/137627.pdf).

<sup>15</sup> The proposal is discussed in detail in A/CN.9/WG.V/WP.109, paras. 42-58.

<sup>16</sup> See note 13, p. 4.

## D. Report of the Working Group on Insolvency Law on the work of its forty-fifth session (New York, 21-25 April 2014)

(A/CN.9/803)

[Original: English]

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## I. Introduction

1. At its forty-sixth session in 2013, after adopting the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) and part four of the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide), the Commission decided that Working Group V should hold a colloquium in the first few days of the working group session scheduled for the second half of 2013 to clarify how it would proceed with the enterprise group issues and other parts of its current mandate and to consider topics for possible future work, including insolvency issues specific to micro, small and medium-sized enterprises (MSMEs). The conclusions of that colloquium were not to be determinative, but to be considered and evaluated by the Working Group in the remaining days of the session, in the context of the existing mandate. Topics identified for possible future work should be reported to the Commission in 2014.<sup>1</sup>

2. The colloquium was held from 16-18 December 2013, during the forty-fourth session of the Working Group from 16-20 December. During its deliberations on 19-20 December, the Working Group agreed to continue its work on the cross-border insolvency of multinational enterprise groups by developing provisions on a number of issues, some of which would extend the existing provisions

<sup>1</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 325.

of the Model Law and part three of the Legislative Guide and involve reference to the Practice Guide on Cross-Border Insolvency Cooperation (A/CN.9/798, para. 16).

3. At its forty-sixth session in 2013, the Commission requested Working Group V to conduct, at its Spring 2014 session, a preliminary examination of issues relevant to the insolvency of MSMEs, and in particular to consider whether the UNCITRAL Legislative Guide on Insolvency Law provided sufficient and adequate solutions for MSMEs. If it did not, the Working Group was requested to consider what further work and potential work product might be required to streamline and simplify insolvency procedures for MSMEs. Its conclusions on those MSME issues were to be included in its progress report to the Commission in 2014 in sufficient detail to enable the Commission to consider what, if any, future work might be required.<sup>2</sup>

## II. Organization of the session

4. Working Group V, which was composed of all States members of the Commission, held its forty-fifth session in New York from 21-25 April 2014. The session was attended by representatives of the following States Members of the Working Group: Algeria, Argentina, Armenia, Brazil, Canada, China, Colombia, Denmark, Ecuador, France, Germany, Greece, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Kenya, Mexico, Namibia, Nigeria, Pakistan, Philippines, Republic of Korea, Russian Federation, Sierra Leone, Spain, Switzerland, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

5. The session was attended by observers from the following States: Chile, Guatemala, Iraq, Libya, Poland, Saudi Arabia and Senegal.

6. The session was attended by the following non-member States having received a standing invitation to participate as observer in the sessions and the work of the General Assembly: Holy See.

7. The session was also attended by observers from the following international organizations:

(a) *Organizations of the United Nations system*: International Monetary Fund, United Nations Conference on Trade and Development and World Bank;

(b) *Invited intergovernmental organizations*: Maritime Organization of West and Central Africa (MOWCA) and Secretaría De Integración Económica Centroamericana (SIECA);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN), European Law Students Association (ELSA), INSOL International (INSOL), Inter-Pacific Bar Association (IPBA), International Bar Association (IBA), International Insolvency Institute (III), International Women's Insolvency and Restructuring Confederation (IWIRC), New York City Bar (NYCBA) and Union Internationale des Avocats (UIA).

8. The Working Group elected the following officers:

*Chairman*: Mr. Wisit Wisitsora-At (Thailand)

*Rapporteur*: Ms. Dalit Zamir (Israel)

9. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.119);

(b) A note by the Secretariat on facilitating cross-border insolvency of multinational enterprise groups (A/CN.9/WG.V/WP.120);

<sup>2</sup> Ibid., para. 326.

(c) A note by the Secretariat on mechanisms suitable for the insolvency of micro, small and medium-sized enterprises: the UNCITRAL Legislative Guide on Insolvency Law (A/CN.9/WG.V/WP.121); and

(d) Comments of the United States of America on the Secretariat's note on facilitating cross-border insolvency of multinational enterprise groups (A/CN.9/WG.V/WP.122).

10. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of: (a) cross-border insolvency of multinational enterprise groups; and (b) solutions provided by the UNCITRAL Legislative Guide on Insolvency Law for the insolvency of MSMEs.
5. Other business.
6. Adoption of the report.

### **III. Deliberations and decisions**

11. The Working Group engaged in discussions on the cross-border insolvency of multinational enterprise groups on the basis of documents A/CN.9/WG.V/WP.120 and A/CN.9/WG.V/WP.122 and solutions provided by the UNCITRAL Legislative Guide on Insolvency Law for the insolvency of MSMEs on the basis of document A/CN.9/WG.V/WP.121. The deliberations and decisions of the Working Group on these topics are reflected below.

### **IV. Solutions provided by the Legislative Guide on Insolvency Law for the insolvency of MSMEs**

12. The Working Group commenced its discussion of this topic on the basis of document A/CN.9/WG.V/WP.121, with a view to advising the Commission whether the Legislative Guide provided sufficient and adequate solutions for the insolvency of MSMEs, and if not, what further work might be required.

13. The Working Group agreed on the importance of the topic, particularly for those countries in which MSMEs have a significant impact on the economy and economic development. The Working Group was strongly of the view that given its extensive experience in developing solutions for insolvency-related challenges, it was the appropriate forum to develop insolvency regimes for MSMEs. There was also agreement on the need to ensure that mechanisms to address the insolvency of MSMEs be fast, flexible, and cost efficient, and that the focus in establishing such mechanisms should be on natural or legal persons engaged in economic activity. However, the Working Group was also of the view that establishing thresholds to delimit micro, small and medium-sized enterprises should be left to States to resolve in light of their particular economic circumstances and policy interests. The Working Group further agreed that the mechanisms provided by the Legislative Guide were not sufficient to address all of the needs of MSMEs; thorough treatment of the issues would require both a consideration of matters not yet addressed in the Legislative Guide as well as the tailoring of solutions already in the Legislative Guide to specifically address MSMEs. For example, the application of elements of the insolvency law, such as creditor committees, the central role of the courts and extensive involvement of insolvency professionals, might not be appropriate for MSME regimes.

14. The Working Group agreed that the issues facing MSMEs were not entirely novel and that solutions for them should be developed in light of the key insolvency principles and the guidance already provided by the Legislative Guide. The Working



Group further agreed that it would not be necessary to wait for the results of the work being done by Working Group I in order to commence the study of insolvency regimes for MSMEs. As to the form that work might take, the Working Group agreed that, while such work might form an additional part to the Legislative Guide, no firm conclusion on that point could be taken in advance of undertaking a thorough analysis of the issues at stake.

## **V. Facilitating the cross-border insolvency of multinational enterprise groups**

15. The Working Group commenced its discussion of the topic on the basis of the list of issues contained in document A/CN.9/WG.V/WP.120, which had been agreed by the Working Group at its forty-fourth session as establishing the basis for future discussions.

### **A. Definitions**

16. The view was expressed that there was a need to ensure that the text produced was forward-looking and that constraining the work by a narrow definition of what constituted a group was not necessarily helpful in view of rapid changes in international business structures. Adoption of broad definitions was encouraged. The Working Group agreed to adopt the definitions of “enterprise group” and “enterprise” from part three of the Legislative Guide as working definitions.

### **B. Guiding Principles**

17. The Working Group discussed the application of the guiding principles of affirmation of the corporate identity and independence of group members and the distinction between main and non-main insolvency proceedings in group enterprise insolvencies, and agreed that these principles should be kept in mind in light of their general importance. It was observed that the discussion on substantive issues might suggest instances in which these principles might need to be refined in the group context. The discussion further identified two additional guiding principles to follow when considering the application of synthetic proceedings (see paras. 21-22 below) and other group solutions. Those additional principles, which were not mutually exclusive, were to consider the overall net benefit for pursuing a group solution over separate individual insolvency proceedings and secondly, that the benefit to creditors should be at least that which would have been achieved had those separate local insolvency proceedings been commenced in isolation. In addition to these guiding principles, it was suggested that the development of options for facilitating the cross-border insolvency of multinational enterprise groups should also consider the key objectives of effective insolvency regimes contained in the recommendations of the Legislative Guide.

### **C. Access and standing**

#### **1. Access to foreign courts for foreign representatives and creditors of insolvency proceedings involving enterprise group members**

18. The Working Group considered the materials provided in A/CN.9/WG.V/WP.120 and the questions raised in paragraph 16 of that document concerning which parties should have access to the various insolvency proceedings concerning group members. It was observed that a distinction could be drawn between access in the context of the Model Law where a single insolvency estate was involved, and the group context, which involved multiple group members and multiple estates in various countries. It was noted that different rights of access for different parties might be required depending upon the nature of the insolvency proceedings affecting the group. In reorganization, for example, the existence of arrangements such as

common financing and shared services and employees might indicate the need for broader rights of access than might be the case where these elements were not present in the group.

19. After discussion, the Working Group agreed that a foreign representative or a representative of a solvent group member in an enterprise group context should have a right of access analogous to article 9 of the Model Law. With respect to creditors of other group members, both solvent and insolvent, access should only be available in specific circumstances. A similar approach should be taken with respect to access of group members, including solvent group members, to insolvency proceedings concerning other members of the same group. This would be of particular importance where there were economic connections between the solvent group members and other insolvent group members. Those connections might generate value where there was insolvency in the group but not necessarily of the entire group, and the solvent member might be affected by, and could contribute to, the insolvency solution adopted. Where synthetic proceedings were used, it might be necessary to consider allowing foreign creditors greater access to ensure that their interests were adequately protected. In addition to the fundamental right of access to insolvency proceedings, the Working Group noted that it would need to consider what access entitled the relevant party to do in the group context. The Model Law, for example, provided the foreign representative with the right to intervene in insolvency proceedings (article 24) and the right to apply for recognition of a foreign proceeding (article 15).

**2. “Standing” for all group members in any insolvency proceeding applied for by a member of the enterprise group**

20. It was observed that it was important for a court that received an application from a foreign representative to consider issues such as the standing of the foreign representative making the application within the corporate group, i.e. which member of the corporate group was represented, where that group member stood in the group, and whether or not there was a coordinating court. There might also be an issue of competing claims for relief from different foreign representatives. It was further observed that the standing of foreign representatives related to issues of standing of creditors and the extent to which creditors’ rights to make representations might be replaced by an insolvency representative making representations on their behalf.

**D. Minimizing parallel proceedings**

**1. Use of “synthetic non-main proceedings” (where creditors are treated in the main proceeding as if a non-main proceeding had opened) to reduce cost and expense**

21. The Working Group expressed interest in exploring the use of synthetic proceedings (as described in document A/CN.9/WG.V/WP.120, paras. 47-52) and how they might facilitate the conduct of enterprise group insolvencies. It was noted that work was being done on the use of such proceedings in the context of revision of the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the EC Regulation) and that there were examples of the use of such proceedings in practice. It was emphasized that synthetic proceedings were typically intended to limit the commencement of unnecessary proceedings, achieving the same outcome as if there were multiple proceedings without the cost and complexity of those multiple proceedings. A point was made that, although it might appear that the use of such proceedings prevented a State from commencing local insolvency proceedings, in fact, such proceedings were either voluntary or the court would forbear from commencing local proceedings because there was no need to do so. The Working Group pointed out a number of issues with respect to such proceedings to be considered, including:

(a) How they might be used in respect of individual debtors, and building upon that, how they might be used in the group context; for example, where there were a number of group members with common centres of main interests (COMI) or alternatively, a number of group members with no common COMI;

(b) The need to safeguard the interests of local creditors, such as by ensuring that the use of such proceedings would not amount to a denial of justice and creditors would be no worse off in the synthetic proceeding than they would have been had a local insolvency proceeding commenced, or where that could not be guaranteed, by commencing a local proceeding;

(c) Recognition of those proceedings in third States, i.e. those in which there were no related group insolvency proceedings;

(d) Possible choice of law and conflicts issues, including those arising from the need to balance the interests of the group with those of individual group members; and

(e) The value of the receiving court being able either to decline to commence local proceedings, or instead to commence such proceedings with a view to the efficacy of the foreign synthetic proceeding.

22. After discussion, the Working Group agreed that it should explore the feasibility of using synthetic proceedings as one of the tools for handling group insolvency proceedings, identifying the different levels of difficulty associated with individual debtors and groups and the entities that may participate in synthetic proceedings (in particular, solvent group members). The Secretariat was requested to prepare appropriate text for consideration at a future session.

## **E. Cooperation and coordination**

23. The Working Group noted that part three of the Legislative Guide (recommendations 240-250) already dealt with many of the issues of cooperation and coordination that might be relevant in the group context and considered whether further provisions might be required. It was noted, for example, that access for solvent group members had been considered and it was suggested that provision might also need to be made for those members to participate in cooperation and coordination. Because an enterprise group could include both solvent and insolvent members, and the solvent members might be prohibited by domestic law from assisting insolvent members of the group, the principles of cooperation and coordination should be specifically extended to include solvent group members. This would ensure that there could be a convergent effort of all group members towards reorganization. This suggestion was widely supported, provided that the participation of a solvent entity was voluntary and not in response to mandatory provisions.

24. The Working Group noted that recommendation 238 of part three of the Legislative Guide permitted, in a domestic context, a solvent group member to voluntarily participate in a reorganization plan proposed for one or more members of an enterprise group that were subject to insolvency proceedings. It was further noted that the essence of this voluntary participation was already discussed in the commentary supporting recommendation 238 of part three of the Legislative Guide. It was generally agreed that recommendation 238 should be extended to the international context, but that the scope should be broadened to encompass more in terms of coordination and cooperation, for example, in the context of liquidation of a group member or members on a going concern basis.

25. After discussion, the Working Group requested the Secretariat to draft a text for consideration at a future session that reflected the issues raised in the discussion, covering areas beyond the scope of recommendation 238 with appropriate safeguards.

## **F. Recognition**

26. The Working Group agreed on the importance of considering the issue of recognition, but noted that it needed to be considered in the context of different scenarios of enterprise group insolvency and how it might be used in such scenarios. One scenario might be where insolvency proceedings had commenced with respect to numerous group members in the same jurisdiction and the interests of creditors in

other jurisdictions were dealt with by way of a synthetic proceeding. A second scenario would be where insolvency proceedings had commenced for different group members in different jurisdictions. The focus of recognition in the first scenario might be to minimize the commencement of secondary proceedings in different jurisdictions, while the focus in the second scenario might be to seek relief and ensure cooperation and coordination. A third scenario might involve the use of one of the proceedings as a coordinating proceeding or appointment of a group coordinator, a possibility currently being considered in the context of revision of the EC Regulation. Consideration of these scenarios gave rise to various issues, including the reasons for seeking recognition, the suitability of the distinction between main and non-main proceedings in the enterprise group context based on the concept of COMI, questions of jurisdiction, appropriate safeguards for creditors, and the relationship of recognition to other possible solutions for enterprise group insolvency.

## **G. Relief**

27. The Working Group noted that part three of the Legislative Guide did not address the relief that might be provided by a recognizing court to the foreign representative(s) presiding over proceedings of several group members commenced in the same forum nor the relief that might be provided by a recognizing court to the foreign representative(s) presiding over a coordinating proceeding. The relief provided by the Model Law was noted and the view expressed that it could be extended to cover enterprise groups. However, while the stay provided by articles 20 and 21 of the Model Law covered only individual actions with respect to the debtor's assets, it was suggested that the most obvious form of relief applicable in a group context might be the application of the stay to limit the commencement of local insolvency proceedings or to deter further action by local creditors that might be damaging to the group solution. (It was noted that article 28 of the Model Law permitted commencement of a local proceeding following recognition of a foreign main proceeding.) It was also noted that the application for relief in a group context might involve different debtors in different jurisdictions where the only connection was membership of the same group.

28. It was also observed that there may be conflicting applications in a group context, for example, an application by local creditors to commence a local proceeding and an application by a foreign insolvency representative to stay commencement of that local proceeding. Specific rules might be required to enable the application to limit commencement of a local proceeding to prevail over the application of local creditors. Those rules might require such a decision to be based upon considerations such as what was in the global best interests of all members of the group taken together and what was required to protect the interests of local creditors.

29. After discussion, the Working Group agreed that there should be further consideration of the relief that might be required in the group context. There was support for developing the possibility of a stay to limit the commencement of proceedings and explore its relevance to the use of synthetic proceedings. The Secretariat was requested to prepare appropriate materials to assist further consideration of these issues.

## **H. Post-application and post-commencement finance**

30. There was broad agreement on the importance of post-application and post-commencement finance in the group context. One view was that nothing more than the treatment already developed in part three of the Legislative Guide was required. A different view was that more was required, but it was unclear at this stage of the discussion what the scope and content of appropriate provisions might be. Issues to be considered included questions of priority, applicable law, social policies, safeguards, and the balance between the interests of the group and individual group members. One proposal for addressing post-application and post-commencement

financing in the group context was to consider it in terms of relief. It might be possible, for example, that part of the relief sought in the context of an application for recognition would involve approval for post-commencement finance granted elsewhere and the priority accorded to it, as well as use of assets in the recognizing jurisdiction to secure post-commencement finance provided to a group member located elsewhere. Appropriate safeguards would again be the global best interests of all members of the group taken together and protection of the interests of local creditors.

31. The Working Group agreed that the proposal to consider post-commencement finance in the context of relief might provide an appropriate starting point for further deliberations on this issue.

## **I. Participants**

### **1. Joint appointment of insolvency representatives to insolvency proceedings concerning different group members**

32. The Working Group noted that recommendations 251 and 252 of part three of the Legislative Guide addressed the possibility of joint appointment of insolvency representatives in the international context. To facilitate such joint appointments, it was suggested that it might be useful to note the possibility of a court recognizing licensed foreign practitioners for appointment in the court's jurisdiction. Various means might be used to facilitate that recognition including: the appropriate licensing body in a recognizing State might indicate which State's practitioners might be recognized for the purposes of such an appointment; or the court may approach it by way of a case-by-case assessment of their suitability. It was noted that the appointment of a foreign insolvency representative might raise regulatory issues, especially those of a disciplinary nature. The ability to recognize a foreign practitioner may depend, for example, upon the extent to which the foreign regime could hold its practitioners liable for their actions in foreign States. It was recalled that the definition of a foreign representative in the Model Law included debtors in possession and agreed that it was necessary to maintain that possibility in discussing joint appointments in a group context.

### **2. Creditors**

33. It was generally agreed that participation by creditors and interested parties in a group context could be strengthened. One proposal was to establish a group creditor committee to facilitate provision of notice to creditors and their access to information, as well as to streamline decision-making, subject to appropriate safeguards to avoid domination of such a committee by a few powerful creditors. Such a creditor committee, it was observed, could provide significant value to the court process and ensure that all necessary issues were brought to the court. Although most useful in a group reorganization, there might also be liquidation scenarios that would benefit from the creation of such a committee. Another proposal was to consider duplicating, at the global level, local mechanisms for creditor participation, such as the appointment of a person to represent the creditors of each group member. A further proposal noted the potential need to appoint a representative for solvent group members that might be involved in group reorganization (reference was made to articles 21(1)(e) and 27(a) of the Model Law). It was also suggested that what could be envisaged was a group committee that could involve all group representatives, including those of solvent entities, facilitate coordination between group members and would be in a position to work with creditors to, for example, negotiate reorganization plans, coordinate synthetic proceedings, and discuss post-commencement finance issues.

34. There was support for development of some of the mechanisms suggested above. It was noted that a number of the issues discussed were already addressed in the Legislative Guide and to some extent in the Model Law. The Working Group agreed, however, that the solutions provided were not sufficient for enterprise group

insolvency and that further consideration of the treatment of these issues in both the Model Law and the Legislative Guide was required. It was also agreed that a number of different concerns relating to participation, relief, access, and synthetic proceedings that had been raised in the course of discussing these topics were interrelated and that any text developed would have to ensure that they were properly integrated. There was no clear consensus on the form the solutions should take.

## J. Reorganization

### **Provision for joint/coordinated disclosure statements and plans of reorganization**

35. The Working Group considered a number of group scenarios involving reorganization. The first involved parallel proceedings for multiple group members requiring coordination of those multiple proceedings (the “horizontal scenario”). The second involved a main proceeding (or a number of main proceedings) and a synthetic proceeding which involved application of the law of the creditors’ respective jurisdictions for resolution of their claims. The third scenario involved several proceedings in several different jurisdictions where the court of one State had a lead coordinating role. In that scenario, the issue was one of leadership and required deference to the role of the lead coordinating court (the “vertical scenario”). The key issue in that scenario was identification of the lead coordinating court. A variation of the third scenario would involve centralization of certain aspects of group insolvency proceedings, such as development of the reorganization plan, in combination with decentralized aspects, such as implementation of the plan. That scenario would avoid the need for multinational coordination in development of the plan, as well as the need for enforcement of decisions made by the lead coordinating court in other jurisdictions. Criteria proposed for identifying the lead coordinating court included the location of the seat of management or key business activities of the group. Another approach suggested was that rather than looking back at the activities of the group members and where they had been conducted in the past, a forward-looking approach should be taken in order to assess which jurisdiction was the most suitable for the group reorganization, such as by reference to viability of finance and where a reorganization plan could be presented. That jurisdiction should be able to lead the process, provided that the choice of that jurisdiction was rational and there was at least a minimum connection to the group.

36. In response to concerns as to the role to be played by the lead coordinating court, it was clarified that that court should not have the power to impose a reorganization on other jurisdictions, but would rather play a lead coordinating role and evaluate the feasibility of the plan, with approval of the plan to be dealt with by each of the local courts concerned. The lead coordinating court could be identified by other courts deciding, in keeping with the principles of requiring a net global benefit for the group and the protection of interests of local creditors, that the proceedings should be coordinated by that other court. It was observed that courts were more likely to take a permissive approach rather than actively promoting a group reorganization through another court and also that promotion and coordination of reorganization plans was one of the key functions of the insolvency representatives and representatives of solvent group members (if any), rather than the courts.

37. Another proposal concerned the use of “living wills” for enterprise groups, drawing upon the experience of the use of living wills for financial institutions. It was suggested that the use of such living wills, which would lay out ideas for reorganization of the enterprise group that it would have rationally considered and publicly set out in a way ascertainable by third parties and creditors, could be expected to make the coordination process more transparent *ex ante* and encourage rational forward planning. Whilst it was observed that an entity engaged in that level of planning was unlikely to be an entity that needed to enter into insolvency, there was support for further exploration of the possible use of living wills.

## K. Conclusions

38. Having concluded its deliberations on the major issues in document A/CN.9/WG.V/WP.120 and taken note of the use being made of the Model Law in group insolvency in practice, the Working Group considered the form its future work on these topics might take. It was suggested that the issues the Working Group had considered were not all on the same level and needed to be approached in different ways depending on the type of group insolvency scenario, e.g. horizontal as opposed to vertical, being considered. Each scenario might require different rules to deal appropriately with the issues raised. It was observed that having distilled the various issues in this manner, the Working Group would then be in a position to decide on the form the rules should take (e.g. model legislative provisions, guide to enactment, commentary such as that found in the legislative guide, or some combination thereof). An analogy to the process of the development of the Model Law was made.

## VI. Other business

39. The Working Group discussed the progress of work on other topics covered by its current mandate, as well as those for possible future work:

(a) The Working Group was advised that a preliminary meeting of the open-ended informal group established to consider the feasibility of developing a convention on international insolvency issues and to study adoption of the Model Law (A/CN.9/798, para. 19) had taken place. The work to be undertaken and the manner in which it might be organized were discussed and the Secretariat agreed to contact group members with further details on how the work could be developed;

(b) The Working Group recalled that at its forty-fourth session (16-20 December 2013), it had noted that the Model Law on Cross-Border Insolvency did not provide explicit solutions for recognition and enforcement of insolvency-derived judgements which had led to uncertainty and could be an impediment to further adoption of the Model Law by States. Recognizing this absence of explicit solutions, and in order to enhance commercial certainty and other objectives of the Model Law, the Working Group recommends that it be granted a mandate to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-derived judgements;

(c) The Working Group further recalled that at its forty-fourth session the treatment of financial contracts in insolvency had been identified as one of four areas of potential future work. The Working Group took note of the interest and the support expressed by several delegations and observer groups for the formation of a study group to consider whether there were inconsistencies between the current treatment of financial contracts and netting in the Legislative Guide on Insolvency Law and recent developments and to provide a report to the Working Group. It was noted that participation in the study group was open to all interested delegates and experts and the involvement of other relevant organizations would be sought.

## E. Note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups

(A/CN.9/WG.V/WP.120)

[Original: English]

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### Introduction

1. In July 2013, the Commission adopted the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (the UNCITRAL Model Law), which includes new material on aspects of the concept of “centre of main interests” (COMI), and part four of the UNCITRAL Legislative Guide on Insolvency Law (the UNCITRAL Legislative Guide), which addresses the obligations of directors in the period approaching insolvency. The Commission noted that the current mandate of Working Group V as it related, *inter alia*, to COMI, had not been exhausted by completion of the Guide to Enactment and Interpretation and that issues relating to enterprise groups remained. The Commission agreed that Working Group V (Insolvency Law) should hold a colloquium in the first few days of the working group session scheduled for December 2013 to clarify how it would proceed with the enterprise group issues and other remaining parts of its current mandate. It should also consider topics for possible future work, including insolvency issues specific to micro, small and medium-sized enterprises (MSMEs). The conclusions of the colloquium were not to be determinative, but to be considered and evaluated by the Working Group in the remaining days of that session, in the context of the existing mandate. Topics identified for possible future work were to be reported to the Commission in 2014.<sup>1</sup>

2. At its forty-fourth session in December 2013, following the three-day colloquium, the Working Group agreed to continue its work on the cross-border insolvency of multinational enterprise groups by developing provisions on a number of issues, which would extend the existing provisions of the Model Law on Cross-Border Insolvency and part three of the UNCITRAL Legislative Guide, as well as involving reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation.<sup>2</sup> While the Working Group considered that those provisions might, for

<sup>1</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No.17 (A/68/17)*, para. 326.

<sup>2</sup> UNCITRAL texts are available from [www.uncitral.org/uncitral/uncitral\\_texts/insolvency.html](http://www.uncitral.org/uncitral/uncitral_texts/insolvency.html).



example, be a set of model provisions or a supplement to the existing UNCITRAL Model Law, the precise form they might take could be decided as the work progressed.

3. The issues agreed by the Working Group as establishing the outline for its future work<sup>3</sup> are discussed below, in the context of the existing articles and recommendations of the UNCITRAL Model Law and the UNCITRAL Legislative Guide; references from other texts are provided for information and inspiration. These include the proposal for amendment of the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (EC Regulation proposal);<sup>4</sup> the draft Guidelines for Coordination of Multinational Enterprise Group Insolvencies, developed by the International Insolvency Institute in 2012 (MEG Guidelines);<sup>5</sup> and the Transnational Insolvency Principles of Cooperation among NAFTA Countries, developed by the American Law Institute in 2003 (the NAFTA Principles).<sup>6</sup>

## I. Facilitating the cross-border insolvency of multinational enterprise groups

### Definitions: enterprise group

#### (a) Provisions

##### (i) *Legislative Guide, part three*

4. Subparagraph 4(a) of the Glossary provides that an “enterprise group” is “two or more enterprises that are interconnected by control or significant ownership”. Subparagraph (b) provides that an “enterprise” is “any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law.”

##### (ii) *EC Regulation proposal*

5. Article 2, paragraph (i), defines a “group of companies” to mean “a number of companies consisting of parent and subsidiary companies”. Article 2, paragraph (j), defines a “parent company” to mean a company which:

“(i) has a majority of the shareholders’ or members’ voting rights in another company (a “subsidiary company”); or

(ii) is a shareholder or member of the subsidiary company and has the right to

(aa) appoint or remove a majority of the members of the administrative, management or supervisory body of that subsidiary; or

(bb) exercise a dominant influence over the subsidiary company pursuant to a contract entered into with that subsidiary or to a provision in its articles of association.”

##### (iii) *MEG Guidelines*

6. The Guidelines define a “multinational enterprise group” to mean “those companies established in more than one country which are linked together by some form of control, whether direct or indirect, or ownership, by which linkage their businesses are centrally controlled or coordinated.”

7. The MEG Guidelines are intended to apply to groups with members, operations, assets and employees located in more than one country, which has unified corporate governance, either through common or interlocking shareholding or by contract. It is

<sup>3</sup> A/CN.9/798, para. 16.

<sup>4</sup> As contained in COM (2012) 744 final, Strasbourg, 12/12/2012, available from [http://ec.europa.eu/justice/civil/files/insolvency-regulation\\_en.pdf](http://ec.europa.eu/justice/civil/files/insolvency-regulation_en.pdf).

<sup>5</sup> Available from [www.iiiglobal.org/component/jdownloads/viewdownload/362/5953.html](http://www.iiiglobal.org/component/jdownloads/viewdownload/362/5953.html).

<sup>6</sup> Available from [www.ali.org/doc/InsolvencyPrinciples.pdf](http://www.ali.org/doc/InsolvencyPrinciples.pdf).

suggested that the Guidelines may also be of use to groups whose component parts operate with relative independence.<sup>7</sup>

**(b) Notes**

8. The explanations included in the Glossary to part three of the Legislative Guide were discussed in the following documents: A/CN.9/WG.V/WP.76, paragraph 3(b); A/CN.9/618, paragraphs 55-58; A/CN.9/622, paragraphs 77-84; A/CN.9/643, paragraphs 123-127; A/CN.9/647, paragraphs 14-23, 28-29; and A/CN.9/666, paragraphs 43-45.

9. The Working Group may wish to consider whether the explanations provided in part three are sufficient for the current work. In particular, consideration might be given to the relevance of the level of integration of the group to the issues raised below i.e. are they more likely to apply in the case of closely integrated groups than to groups in general. Integration in groups and its impact on the issues included in part three is discussed in the commentary, for example, chapter I, paragraph 15; chapter II, paragraphs 4 and 12, as well as in paragraphs 6 and 13 of A/CN.9/WG.V/WP.82/Add.4 (summarized in paras. 8 and 9 of A/CN.9/WG.V/WP.114).

**A. Guiding principles**

**1. Affirmation of the corporate identity and independence of group members**

*Legislative Guide, part three*

10. Recommendation 219 and paragraph 105 of the commentary affirm the principle of maintaining the separate legal identity of each member of an enterprise group; it is recommended that exceptions to that principle be limited to the situations outlined in recommendation 220 in which substantive consolidation might be justified:

“(a) Where the court is satisfied that the assets or liabilities of the enterprise group members are intermingled to such an extent that the ownership of assets and responsibility for liabilities cannot be identified without disproportionate expense or delay; or

“(b) Where the court is satisfied that the enterprise group members are engaged in a fraudulent scheme or activity with no legitimate business purpose and that substantive consolidation is essential to rectify that scheme or activity.”

**2. Distinctions between main and non-main insolvency proceedings might not be useful in group enterprise insolvencies**

11. The distinction between main and non-main proceedings (based on COMI and establishment respectively) is a key element of both the EC Regulation and the Model Law. In the EC Regulation, COMI concerns the proper place for commencement of proceedings and thus applicable law, while in the Model Law, it forms the basis of the recognition process and determines the relief flowing from recognition of a foreign proceeding. In both of those instruments, the focus is upon an individual debtor.

12. The application of the COMI concept to the group situation has been the subject of several working papers<sup>8</sup> and the issue has been discussed by the Working Group on numerous occasions.<sup>9</sup> At its thirty-first session, for example, the Working Group concluded (A/CN.9/618, para. 54) that the difficulties of achieving an agreed definition of the COMI of an enterprise group suggested the need to focus, instead, on facilitating the conduct of group cross-border insolvency proceedings by way of

<sup>7</sup> MEG Guidelines, Introduction, pages 6-7.

<sup>8</sup> A/CN.9/WG.V/WP.74/Add.2 (paras. 5-12); A/CN.9/WG.V/WP.76/Add.2 (paras. 2-17); A/CN.9/WG.V/WP.82/Add.4 (paras. 10-15); A/CN.9/WG.V/WP.85/Add.1 (paras. 3-13); A/CN.9/WG.V/WP.99, paras. 55-64; and A/CN.9/738, paras. 36-37.

<sup>9</sup> The conclusions reached in these discussions are summarized in A/CN.9/WG.V/WP.114.

coordination and cooperation. At its thirty-fifth session, the Working Group generally agreed (A/CN.9/666, paras. 26-27) that it would be difficult to reach a definition of the COMI of an enterprise group in order to limit commencement of parallel proceedings or to apply the recognition regime of the Model Law to the enterprise group as a whole.

## **B. Access and standing**

### **1. Access to foreign courts for foreign representatives and creditors of insolvency proceedings involving enterprise group members**

#### **(a) Provisions**

##### *(i) Model Law*

13. Article 9 of the Model Law provides a right of direct access for the foreign representative to courts in the State enacting the Model Law. The right of direct access is accompanied by a limitation of the jurisdiction of the courts of the enacting State to the application itself; the sole fact of making an application under the Model Law will not subject the foreign representative or the foreign assets and affairs of the debtor to that jurisdiction for any other purpose (article 10). Foreign creditors have the same rights of access to proceedings in the enacting States as creditors of that State (article 13).

##### *(ii) Legislative Guide, part three*

14. Recommendation 239 (a) addresses the same issue in the context of enterprise groups: it is recommended that the insolvency law should permit foreign representatives and creditors to have access to domestic courts.

#### **(b) Notes**

15. Right of access in the Model Law is limited to the foreign representative as defined in article 2, subparagraph (d) (“a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding”), and to foreign creditors. “Creditor” is not a term defined in the Model Law, although it is explained in the Legislative Guide as being “a natural or legal person that has a claim against the debtor that arose on or before the commencement of the insolvency proceeding” (Terms and definitions, para. 12(j)). The focus of the use of both of those terms in those texts is the connection to a single debtor; in the group context, the focus may need to be broader to encompass creditors or the insolvency representatives of several members of the same group that are subject to insolvency proceedings. While recommendation 239 addresses access for foreign representatives and creditors to domestic courts, it does not explicitly refer to access by the foreign representative or creditor of any group member to the courts conducting proceedings concerning other group members.

16. The Working Group may wish to consider (a) whether the insolvency representative of any group member subject to insolvency proceedings should have access to all insolvency proceedings concerning group members; and (b) whether the creditors of any group member subject to insolvency proceedings should have access to the proceedings concerning all other group members. Access for such creditors might be addressed through the formation of a group creditor committee.

### **2. “Standing” for all group members in any insolvency proceeding applied for by a member of the enterprise group**

#### **(a) Provisions**

##### *(i) Model Law*

17. Upon recognition of a foreign proceeding, the Model Law provides standing for a foreign representative to participate in any local insolvency proceeding regarding

the debtor in the enacting State (article 12), to initiate an action for avoidance of antecedent transactions in the enacting State (article 23), and to intervene in any proceeding in the enacting State in which the debtor is a party (article 24). Foreign creditors have the same rights to commence an insolvency proceeding and to participate in local proceedings as creditors of the enacting State (article 13).

(ii) *EC Regulation proposal*

18. Draft article 42d of the proposal to amend the EC Regulation provides that each insolvency representative appointed in insolvency proceedings concerning one group member will have standing in the proceedings concerning other members of the same group. In particular, the insolvency representative has a right to be heard and participate in the other proceedings (in particular by attending creditors' meetings), to request a stay of the other proceedings, to propose a reorganization plan in the other proceedings in a way that would enable the respective creditors' committee or court to take a decision on it in accordance with the applicable law of those proceedings, and to request additional procedural measures that may be necessary to promote reorganization.

(iii) *MEG Guidelines*

19. Guideline 3 provides that to the extent permitted by local law, the court should authorize other enterprise group members or their insolvency representatives to be heard on matters that materially affect their rights or interests in the enterprise group.

20. Guideline 4 provides that the court sitting in a jurisdiction that has adopted the UNCITRAL Model Law should not decide the COMI of a group member until it has first ascertained the facts relating to the group's structure, location and solvency and has heard from authorized insolvency representatives of other group members on the proper location of that group member's COMI.

(b) **Notes**

21. Standing in the Model Law is based upon recognition of the foreign proceeding in accordance with chapter III. A foreign proceeding may be recognized if, inter alia, the foreign representative applying for recognition is, pursuant to article 17, subparagraph (1)(b), "a person or body within the meaning of subparagraph (d) of article 2", i.e. authorized to perform certain functions with respect to the debtor. The foreign representative has to provide evidence of that authorization in accordance with article 15, paragraph (2), as part of the application for recognition.

22. In a group context, there is a need to consider the extent and structure of the group in order to determine who might have standing to, for example, participate in proceedings concerning group members. An insolvency representative might be required, for example, to provide to the court which commences the insolvency proceedings to which he or she is appointed certain information relating to the composition, structure, location, solvency and affairs of each group member or of each group member that will be relevant to the insolvency proceedings concerning the group. That information might include, for example, the proper name and registered office of each group member, the names of officers and directors of each group member, details of any insolvency proceedings commenced with respect to group members and the financial arrangements of the group. That information might then be made available to all other courts conducting group proceedings, although some way of avoiding significant duplication of information in large group insolvencies might be desirable.

23. The issue of the linkages between group members was discussed in the Working Group for the purposes of making a joint application for commencement of insolvency proceedings in the domestic context. The Working Group considered whether a recommendation specifying the relevant factors should be developed, but concluded that since the basis of the joint application was that the debtors were members of a group, information substantiating the existence of the group would

generally be required in order for the court to commence the insolvency proceedings (A/CN.9/647, para. 35).

24. The approach of article 18 of the Model Law might also be relevant, requiring foreign representatives to update the information provided to the receiving court on an ongoing basis.

25. There is also an issue of the scope of standing in the group context and whether the insolvency representatives of all group members would have standing analogous to articles 12 and 24 of the Model Law with respect to all other group members subject to insolvency proceedings. In large groups, that approach might require research into the provisions of local law in numerous jurisdictions. The same comment could be made with respect to creditors and article 13. As noted above, creditor issues might be addressed through the formation of a group creditor committee.

### **3. Group members voluntarily joining the insolvency proceeding of the parent group member and agreeing to subject themselves to the jurisdiction of that proceeding**

#### **(a) Provisions**

##### *(i) Legislative Guide, part three*

26. No provision to this effect is included in part three in so far as it addresses the cross-border context. In the domestic context, recommendation 238 addresses the issue in a limited manner, permitting a solvent member (or at least one not subject to insolvency proceedings) of an enterprise group to voluntarily participate in a reorganization plan proposed for one or more members of that enterprise group that are subject to insolvency proceedings.

##### *(ii) NAFTA Principles*

27. Principle 23 provides that a subsidiary should be permitted to apply for insolvency in the jurisdiction in which the parent's insolvency proceedings have commenced, so that reorganization can be administered on a group basis. Where there is no proceeding in the States of the subsidiary's main interests, procedural or substantive consolidation should be available under applicable law in the jurisdiction of the parent's insolvency. The possibility of parallel proceedings is acknowledged, in which case coordination should facilitate achievement of the benefits of consolidation as far as possible.

#### **(b) Notes**

28. The Working Group's conclusions on participation of solvent group entities in the insolvencies of other group members (in the domestic context) can be found in documents A/CN.9/618, paragraphs 18-20, and A/CN.9/622, paragraphs 17-19.

29. Paragraphs 11-15 of Chapter II (Domestic issues) of the commentary to part three discuss the possibility of permitting a solvent group member to be party to a joint application for commencement in a domestic context and the situations in which that might be appropriate. A distinction is drawn between an apparently solvent member which, on further investigation is shown to fall within the commencement criteria of recommendation 15 either on the basis of insolvency or imminent insolvency, and members not falling within that category. In the latter situation, the Guide considers different approaches. Firstly, where the solvent member does not meet the criteria for commencement of insolvency proceedings, it might nevertheless be in the best interests of the group as a whole, especially where the group is closely integrated, for that member to participate in the proceedings. Factors that may be relevant to determine whether the necessary degree of integration exists are mentioned in Chapter II, paragraph 12. A further approach may be to allow such participation where the group is fictitious or where the situation would support substantive consolidation under recommendation 220 (substantive consolidation).

30. Paragraph 152 of Chapter II (Domestic issues) discusses the situations in which it might be appropriate to allow a solvent group member to agree to participate in a reorganization plan for other group members, subject to addressing certain concerns, including as to the need for confidentiality of information about that solvent group member (especially in the context of the disclosure statement).

31. The jurisdiction of the relevant court is essential for voluntary submission. It will be necessary to ensure that when subsidiaries want to participate in the insolvency proceedings of, for example, another subsidiary or even to appear when their interests are affected, the receiving court doesn't lack jurisdiction. The Working Group may wish to discuss the explicit granting of jurisdiction and some of the group scenarios in which that might be appropriate.

## **C. Recognition**

### **1. Recognition of foreign proceedings and foreign representatives (as between different proceedings concerning different group members), including recognition of foreign proceedings commenced against several group members at the same court**

#### **(a) Provisions**

##### *(i) Model Law*

32. Chapter III of the Model Law establishes the framework for recognition of foreign proceedings concerning a single debtor. These articles address the application and supporting documentation required (article 15), presumptions concerning recognition (article 16), the decision to recognize a foreign proceeding (article 17) and subsequent information (article 18).

##### *(ii) Legislative Guide, part three*

33. Recommendation 239 (b) recommends the insolvency law provide for recognition of foreign proceedings in the context of enterprise groups, if necessary under applicable law. Part three focuses on the desirability of providing legislative authorization for this recognition where it would be necessary to facilitate the cooperation and coordination that is the focus of Chapter III (International issues) (paras. 11-13).

#### **(b) Notes**

34. The Working Group's discussion on including provisions on recognition in part three is contained in A/CN.9/686, paragraphs 17-21. The Working Group may wish to consider whether a recognition regime along the lines of the Model Law might be developed and if so, the enterprise group situations in which it might be relevant and how it might relate to other points raised here, such as voluntary submission to jurisdiction, the provisions that such a regime might need to include and the legal effects of recognition.

2. **Identification of the “parent” and/or “primary group members” of an enterprise group that might adopt the role of, for example, facilitating development of a reorganization (or liquidation) plan, coordinating continuation or replacement of existing finance and retaining professionals**
3. **Recognition of one foreign proceeding as the coordinating proceeding, in appropriate circumstances**

**(a) Provisions**

*(i) Legislative Guide, part three<sup>10</sup>*

35. Having considered the question of a coordination centre in some detail (see Notes below), the Working Group decided not to pursue it and accordingly, part three does not include recommendations addressing one group proceeding taking up a coordinating role, although that role is addressed in terms of the insolvency representative (see paras. 62-64 below).

*(ii) MEG Guidelines*

36. The Guidelines introduce the concept of a “group centre” (GC), which means “the jurisdiction from which the operations of an integrated multinational enterprise are directed” and provide a framework for conduct of insolvency proceedings concerning group members centred on the GC. In introducing the concept, it is noted that use of the concept of COMI is avoided, principally because of the different functions it fulfils in the EC Regulation and the UNCITRAL Model Law and the difficulties of identifying what it would mean in the group context.<sup>11</sup> Guideline 9, however, provides that when proceedings have commenced in different jurisdictions with respect to multinational enterprise group members, a court with jurisdiction over a group member may consider delaying its decision on that member’s COMI until the GC court has made a decision on the COMI of the group as a whole.

37. The Commentary also notes that since many integrated multinational enterprise groups are controlled centrally, the cross-border insolvencies of those groups would function more efficiently if they were coordinated under central direction.<sup>12</sup>

38. Guideline 12 provides that when insolvency proceedings commence in the context of a group that has operated as an integrated enterprise, and international coordination is likely to assist in maximizing the value of assets for all creditors, a GC should be identified to direct that coordination. Other Guidelines provide: that the GC is presumptively the proper jurisdiction for insolvency proceedings concerning group members over which the GC has jurisdiction (Guideline 13); other courts with jurisdiction over group members should acknowledge the jurisdiction of the GC over the group (Guideline 14); each group member seeking relief should file its own main case in the GC (Guideline 15); all cases concerning group members should be administratively coordinated in the GC (Guideline 16); any stay applicable in the GC should be enforced internationally (Guideline 17); other proceedings concerning group members may only be commenced as secondary proceedings (Guideline 18); and where applications to commence group insolvency proceedings are made in two or more jurisdictions, those jurisdictions should not make decisions until all interested parties have had the opportunity to be heard on the location of the GC and, if appropriate, communication has taken place between the courts of jurisdictions in which requests to commence proceedings concerning other group members have been made (Guideline 19).

39. Guideline 21 addresses the situation in which the GC cannot assert jurisdiction over a meaningful segment of the enterprise group members where, for example, a single GC is determined not to be appropriate because the group lacks sufficient

<sup>10</sup> The Working Group’s discussion of COMI and coordination centres in the context of enterprise groups is summarized in A/CN.9/WG.V/WP.114.

<sup>11</sup> Commentary, pages 9-10.

<sup>12</sup> Ibid., page 10.

integration to justify full central coordination or the asserted jurisdiction of the GC is not respected in other jurisdictions. In those cases, coordination will be important.

40. The notes accompanying the Guidelines do not specify the factors relevant to identifying the GC, although they do refer to the factors concerning group integration as outlined in the UNCITRAL Legislative Guide (part three, chapter I, para. 15). It is observed that the GC should be readily ascertainable in groups with strong integration and central management.<sup>13</sup>

(iii) *EC Regulation proposal*

41. The proposal does not adopt either of the approaches referred to in points 2 and 3 above, but rather focuses on main and secondary proceedings, and measures that limit commencement of the latter (see below) and expand the role of the courts in the former.

42. Proposed recital 20b provides that the introduction of rules on the insolvency of groups should not limit the possibility of a court commencing insolvency proceedings for several members of the same group in a single jurisdiction if the court finds that the COMI of those members is located in a single Member State. In such situations, the court should also be able to appoint, if appropriate, the same insolvency representative in all proceedings concerned (see point G1 below).

(b) **Notes**

43. The Working Group's discussion of the coordination centre is summarized in document A/CN.9/WG.V/WP.114 and the paragraphs below indicate key points. At its thirty-fifth session, the Working Group concluded, among other things (A/CN.9/666, para. 32), that it might be possible to develop a rule to facilitate the coordination of group insolvency proceedings by identifying one group member, such as the controlling member, to function as the "coordination centre" for those proceedings. The Working Group considered various factors that might be relevant to identifying the controlling member of a group, including factors relevant to the degree of integration of the group (document A/CN.9/WG.V/WP.82/Add.4, paras. 6 and 13).

44. Identifying a coordination centre in an enterprise group brought with it a number of the difficulties associated with identifying the COMI of an individual debtor. Those concerned, in particular, identifying the State that should make the decision with respect to the location of the coordination centre and whether that decision could be enforced or at least recognized in other States.

45. At its thirty-sixth session that possibility was further discussed at some length (A/CN.9/671, paras. 18-23) based on the issues raised in A/CN.9/WG.V/WP.85/Add.1, paragraphs 3-13. It was ultimately agreed that recommendations on the identification of a coordination centre in a manner that was non-binding and would have no legal consequences should not be included in part three. The issue was, however, to be addressed in the commentary and in the final version of recommendation 250. Recommendation 250 (c) suggests that, as one form of cooperation between insolvency representatives, one of them might take on a coordinating role.

46. The Working Group may wish to consider whether it would be possible to develop an approach based upon points 2 and 3 above, including the enterprise group situations in which that approach would be appropriate, perhaps by reference to the degree of integration of the group or some other factors; how identification of the coordination centre or primary group member would relate to a recognition regime (e.g. would the court commencing proceedings with respect to the parent or coordination centre of a group identify it as such, would it be the basis on which those proceedings might be recognized as foreign proceedings, and would the recognizing court have to satisfy itself independently that the foreign group member was the parent or coordination centre in much the same way as COMI is determined under the Model Law); the factors relevant to identification of such a centre; the legal effect of

<sup>13</sup> MEG Guidelines, Section III, Central coordination of multinational enterprise groups insolvencies, pages 12-13.



such identification and the rules required to support that legal effect, especially in the cross-border context; the default position that would apply in cases where identification or agreement on a coordination centre was not possible; and other issues that would need to be addressed.

## **D. Minimizing parallel proceedings**

### **1. Use of “synthetic non-main proceedings” (where creditors are treated in the main proceeding as if a non-main proceeding had opened) to reduce cost and expense**

#### **(a) Provisions**

##### *(i) EC Regulation proposal*

47. The proposal includes several provisions on synthetic non-main proceedings. Article 18, paragraph 1, provides, among other things, for the insolvency representative of the main proceeding to give an undertaking that the distribution and priority rights that local creditors would have had if non-main proceedings had commenced will be respected in the main proceedings. Such an undertaking is to be subject to the form requirements, if any, of the State of the commencement of the main proceeding and is to be binding on, and enforceable against, the insolvency estate.

48. Article 29a provides that the court seized of the request to commence the non-main proceeding is required to notify the insolvency representative of the main proceeding and provide an opportunity for that person to be heard prior to making its decision. At the request of that insolvency representative, the court should postpone its decision on commencement or refuse to commence the non-main proceeding if that proceeding would not be necessary to protect the interests of local creditors. Particular reference is made to the cases where the insolvency representative gives an undertaking as referred to in article 18, paragraph 1, and complies with its terms. The insolvency representative of the main proceeding can challenge a decision to commence a non-main proceeding.

49. The proposal includes provision for notice of the commencement of non-main proceedings, as well as for rapid dissemination of information on those proceedings to creditors, and the establishment of free, publically accessible electronic registers of cases commenced in jurisdictions subject to the Regulation (recital 29a and articles 20a-d, 21 and 22). Article 20a specifies the information to be available in the Register, article 20b deals with interconnection of the registries, article 20c with costs and article 20d with registration of insolvency proceedings. Articles 21 and 22 deal with publication and registration in other Member States. This measure is intended, inter alia, to assist in preventing the commencement of non-main proceedings by improving the information available to creditors and courts.

#### **(b) Notes**

50. Use of “synthetic” non-main proceedings avoids the formal opening of a non-main proceeding by promising local creditors that they will not fare worse than if a “real” non-main proceeding had been opened because the priority they would be entitled to under local laws will be respected in the main proceeding. Typically, that promise or undertaking is provided by the insolvency representative appointed in the main insolvency proceeding.

51. Synthetic non-main proceedings may have numerous benefits, including cost savings (e.g. payment of the fees of only one insolvency representative and the costs of only one court), shorter time frames for completion of the proceedings, fewer disputes and less competition between proceedings, more efficient creditor participation, reduced need for coordination and cooperation between potentially numerous proceedings, more effective cross-border reorganization, and reduction of the obstructions caused by the removal of part of the assets of the debtor from the control of the insolvency representative of the main proceeding. Certain cases are

often cited as providing good examples of how such proceedings might work in practice and the advantages they might bring.<sup>14</sup>

52. Limitations on the use of synthetic proceedings might include the difficulty of addressing claims other than those of a purely monetary value (for example, where monetary claims are connected with some additional administrative protection, such as the need in some jurisdictions to have employee redundancies sanctioned by a court); the reliance on domestic courts being able (and willing) to provide assistance by doing whatever they could have done in the case of a domestic insolvency, and, in the other case, deferring to that being done elsewhere and not commencing a non-main proceeding; defining if and when a duty to give the undertaking arises and the extent of that duty; and deciding the circumstances in which it might be appropriate to use such proceedings (it may only be realistic, for example, where the result will not lead to the foreign priority claims devouring or having a significant impact upon the main estate).<sup>15</sup> The Working Group might wish to consider how these issues might be addressed to facilitate the wider use of such proceedings.

## E. Relief

1. **Relief that may be provided by a recognizing court to the foreign representative(s) presiding over the proceedings of several group members commenced in the same forum**
2. **Relief that may be provided by a recognizing court to the foreign representative(s) presiding over the coordinating proceeding**

### (a) Provisions

#### (i) *Legislative Guide*

53. Neither of these points is addressed in part three of the Legislative Guide.

#### (ii) *Model Law*

54. The Model Law provides for three types of relief — provisional relief available between the making of an application for recognition and the decision on that application (article 19), relief available automatically following recognition of a foreign main proceeding (article 20) and additional discretionary relief available to both foreign main and non-main proceedings following recognition (article 21).

<sup>14</sup> In *Collins & Aikman* [*In the matter of Collins & Aikman Europe, SA*, the High Court of England and Wales, Chancery Division in London, [2006] EWHC 1343 (Ch)] an administration proceeding commenced in the United Kingdom, which was the COMI of certain European operations that spanned several European Union jurisdictions. Certain Spanish trade creditors sought to commence non-main proceedings in Spain in order to protect the treatment their claims would receive under Spanish insolvency law, but not under the United Kingdom rules. A special category of claim was created for the Spanish creditors so that they would be entitled to a distribution identical to what they would receive under Spanish law, but within the main United Kingdom insolvency distribution. Objections were lodged in the United Kingdom proceedings to this proposal. The debtor prevailed and the Spanish claims were paid on that basis. Significant costs were saved and control was preserved in the United Kingdom main proceeding without the unpredictability that was likely to occur if a non-main proceeding was commenced. Cases concerning *Nortel Networks* and *MG Rover* are also cited as examples of the use of synthetic proceedings.

<sup>15</sup> The court analysis in *Collins & Aikman* recognized that the claims of the Spanish creditors would only meaningfully affect one of the 24 subsidiaries not already in non-main proceedings. In a case that predated adoption of the Model Law, *In re Treco* [240 F.2d 148, 159 (2d Cir. 2001)], the court expressed concern about the disparity in the treatment of a secured claim between the law of the country where the funds were located and the law of the country which sought to administer the funds. The court gave that disparity as reason for refusing to order transfer of the funds. However, the court did not consider whether the funds could be transferred subject to application of the law of the transferring jurisdiction or, in other words, provide the secured creditor with a form of synthetic protection.

*(iii) EC Regulation proposal*

55. Draft article 42d, subparagraph 1 (b) permits an insolvency representative appointed with respect to any group member to request a stay of proceedings commenced with respect any other member of the same group. The court that commenced the latter proceedings should stay those proceedings (for up to three months) in whole or part if it is proven that the stay would be beneficial for the creditors in those proceedings. The stay may be renewed or continued for the same time period and the court ordering the stay may require the insolvency representative of the main proceeding to take measures to guarantee the interests of creditors.

*(iv) MEG Guidelines*

56. Guideline 17 provides that the stay applicable in the proceedings commenced in the Group Center should be enforced internationally with respect to each group member. Non-main proceedings under Guideline 18 may be opened where it is necessary to enforce the stay ordered by the Group Center court.

**(b) Notes**

57. A basic principle of the Model Law is to provide the relief considered necessary for the orderly and fair conduct of a cross-border insolvency, whether that is provided on an interim basis or as a consequence of recognition. As such, it neither necessarily imports the consequences of the foreign law into the insolvency system of the enacting State nor applies to the foreign proceeding the relief that would be available under the law of the enacting State. The Model Law also includes measures to ensure coordination of the relief provided as between main and non-main proceedings and local and foreign proceedings (articles 28-29). The Working Group may wish to consider whether the relief regime of the Model Law might be useful in the group context and in particular the connection between relief and recognition; and the impact of recognition of a number of different foreign proceedings on the court's ability to tailor relief to those proceedings and to coordinate relief among the different proceedings.

**F. Post-application and post-commencement finance****1. Joint financing among members of the enterprise group addressing issues of collateralization, supplier credit, guarantees, obligations and validation of collateral granted and priority for funds advanced****(a) Notes***(i) Legislative Guide, part three*

58. Part three addresses post-application and post-commencement finance in the context of domestic groups only; the Working Group concluded that the recommendations applicable in that context were not directly applicable in the international context as various difficulties would arise, such as matters of personal liability of directors and insolvency representatives for new debt, the application of avoidance provisions, competence and priorities for certain types of claims under applicable law and their cross-border recognition (A/CN.9/647, para. 89; A/CN.9/666, para. 75).

59. Paragraphs 47-51 of the commentary note that post-application finance is covered by recommendation 39 of the Legislative Guide, which deals with provisional measures. The Working Group's conclusions on post-application finance are contained in A/CN.9/643, paras. 49-51.

60. Recommendations 211-216 and paragraphs 55-74 of the commentary address post-commencement finance in the context of domestic enterprise groups. These recommendations address authorization for post-commencement finance to be provided by one group member to another subject to insolvency proceedings and the various forms that might take (recommendation 211), the pre-conditions for

post-commencement finance (recommendation 212), possible authorization by the court or creditors (recommendation 213), provision of post-commencement finance by one group member subject to insolvency proceedings to another group member also subject to insolvency proceedings (recommendation 214), priority (recommendation 215) and security (recommendation 216).

61. Post-commencement finance in the international context was discussed in the following documents: A/CN.9/WG.V/WP.74/Add.2, paragraphs 15-22; A/CN.9/WG.V/WP.82/Add.4, paragraphs 17-25; A/CN.9/622, paragraphs 87-91; A/CN.9/647, paragraph 89; A/CN.9/666, paragraphs 33-37 and 75.

## **G. Participants**

### **1. Joint appointment of insolvency representatives to insolvency proceedings concerning different group members**

#### **(a) Provisions**

##### *(i) Legislative Guide, part three*

62. Recommendation 251 of part three addresses the possibility of appointing the same or a single insolvency representative to more than one group member and suggests that a court be permitted to coordinate with foreign courts to achieve this goal. Recommendation 252 addresses measures that might be taken where conflicts of interest arise.

##### *(ii) MEG Guidelines*

63. Guideline 10 provides that a single insolvency representative should be appointed to all proceedings commenced in respect of members of the same enterprise group to handle matters in which group members have common interests and as to which there are no conflicts of interest among the group members.

#### **(b) Notes**

64. Appointment of insolvency representatives in the international context was discussed in documents A/CN.9/666, paragraph 105, and A/CN.9/671, paragraphs 51-54. Aside from noting the clear benefits of such an approach, the commentary of part three (Chapter III, paras. 43-47) points to some of the difficulties, noting that some jurisdictions require insolvency representatives to be registered or licensed; any insolvency representative appointed in multiple jurisdictions would need to comply with the legal requirements and obligations applicable in all of those jurisdictions; and potential conflicts of interest that might arise across the group members to which the person is appointed need to be addressed.

### **2. Creditors**

#### **(a) Provisions**

##### *(i) EC Regulation proposal*

65. Article 42d provides that an insolvency representative appointed in insolvency proceedings concerning one group member shall have the right to be heard and participate, in particular by attending creditors' meetings, in any of the proceedings commenced with respect to any other members of the same group.

##### *(ii) MEG Guidelines*

66. In addition to the appointment of a single insolvency representative, Guideline 11 provides that there should be a single officeholder to represent, for example, creditor committees and representatives, to the extent not precluded by conflicts of interest.

**(b) Notes**

67. Paragraph 49 above notes the inclusion in the proposal for amendment of the EC Regulation of registries of insolvency proceedings to ensure information is available to creditors and other stakeholders and to minimize commencement of secondary proceedings.

68. The issue of creditor access to information was discussed at the forty-fourth session of the Working Group (December 2013). The proposal contained in paragraphs 33-34 of document A/CN.9/WG.V/WP.117 made several points including that: while creditors may have access to a local insolvency representative for local proceedings, creditors that are geographically distant from the local proceeding may not have such access or the knowledge as to how to gain access to the case, the insolvency representatives or information about the status of the case; in some jurisdictions, the representative may not be required to communicate with creditors, making the process appear opaque; and while the UNCITRAL Model Law addresses cooperation between the courts and between foreign representatives, it does not address cooperation between creditor representatives (official or unofficial). It was noted that recommendations 126-136<sup>16</sup> of the Legislative Guide address the participation of creditors in domestic insolvency proceedings, but that such participation was not addressed in the cross-border or group context.

69. The proposal suggested a number of provisions that could be added to the Legislative Guide or considered in any future work on groups, including providing initial information to creditors on location, types of asset and asset value; reporting to creditors about the status of the case and on significant dispositions of assets and payment of claims; addressing cooperation between insolvency representatives and creditors, creditor representatives or creditor committees; facilitating easier access to courts or insolvency representatives; ensuring consistency and simplicity of claims procedures; and providing information to insolvency representatives and courts about common claims of similarly situated creditors. More detail is provided in the colloquium presentations for session B1, available at [www.uncitral.org/uncitral/en/commission/colloquia/insolvency-2013-papers.html](http://www.uncitral.org/uncitral/en/commission/colloquia/insolvency-2013-papers.html).

70. Another issue that might be considered is cross-filing of claims, where each insolvency representative may assert the claims made in their proceeding in every other proceeding concerning the same debtor, allowing every claim to share in the distribution in every proceeding. That may be facilitated by filing a “class” proof of claim on behalf of all creditors. In the group context, cross-filing may be relevant beyond individual debtors and involve multiple members of the same group.

**H. Cooperation and coordination****1. Authorizing contact and coordination between the courts and between the insolvency representatives (including foreign representatives or other group members designated by the group) across enterprise group members subject to insolvency proceedings****(a) Provisions***(i) Legislative Guide, part three*

71. Recommendations 240-250 build upon Chapters IV and V of the Model Law. Recommendations 240-245: authorize cooperation to the maximum extent possible between courts and between courts and insolvency representatives in respect of insolvency proceedings concerning members of the same enterprise group (recommendation 240); suggest possible forms of cooperation (recommendation 241); authorize direct cross-border communication (recommendation 242); suggest the conditions that should apply to cross-border communication involving courts

<sup>16</sup> Recommendation 137 might also be relevant as it relates to the right to be heard.

(recommendation 243) and the effects of communication (recommendation 244); and address the coordination of hearings (recommendation 245).

72. Recommendations 246-250 authorize: cooperation to the maximum extent possible between the insolvency representatives and the courts in respect of insolvency proceedings concerning members of the same enterprise group (recommendation 246); cooperation between insolvency representatives appointed in different group proceedings (recommendation 247); direct communication between the insolvency representative and foreign courts concerning the proceedings to which the insolvency representative was appointed and other proceedings concerning the same group (recommendation 248); and direct communication between insolvency representatives appointed to insolvency proceedings concerning different group members (recommendation 249). Possible forms of cooperation between insolvency representatives are also suggested (recommendation 250).

73. These recommendations are limited to indicating the role of the insolvency representative in cross-border cooperation; they do not explicitly provide for the involvement or appointment by the group of any other person to engage in cooperation and coordination of proceedings. Recommendation 241(c) does suggest that such a person might be appointed at the direction of the court; this recommendation is based on article 27, subparagraph (a), of the Model Law.

(ii) *EC Regulation proposal*

74. The proposal extends the existing coordination and cooperation provisions (which are limited to insolvency representatives) of the EC Regulation to include the courts. Article 42a establishes a duty to cooperate and communicate information with other insolvency representatives appointed to group member proceedings (para. 1) and specifies possible means of cooperation — communicating with each other, exploring the possibilities for reorganization of the group and coordinating the administration and supervision of the groups affairs (para. 2). Paragraph 2 also provides that the insolvency representatives may agree to grant additional powers to the insolvency representative appointed in one of the proceedings where such an agreement is permitted by the rules applicable to each of the proceedings.

75. Article 42b addresses communication and cooperation between courts, establishing an obligation to cooperate “to the extent such cooperation is appropriate to facilitate the effective administration of the proceedings and is not incompatible with the rules applicable to them” (para. 1); authorizing direct communication (para. 2); and specifying possible means of cooperation, including coordinating conduct of hearings and coordination of the approval of protocols (para. 3).

76. Article 42c addresses cooperation and communication between insolvency representatives and courts, establishing an obligation for the insolvency representative to communicate with any court before which there is an application for commencement of proceedings with respect to a group member or which has commenced such proceedings “to the extent such cooperation is appropriate to facilitate the effective administration of the proceedings and is not incompatible with the rules applicable to them”. The insolvency representative may request information from that court regarding the other member of the group or request assistance with respect to the proceedings to which he or she has been appointed.

(iii) *NAFTA Principles*

77. According to Procedural Principle 24, coordination and cooperation should apply to parallel proceedings involving a subsidiary of a foreign parent debtor to the same extent as it applies to parallel proceedings involving the debtor. It is acknowledged that certain decisions, such as allocation of value, may be determined differently because of the need to respect the corporate form.

(iv) *MEG Guidelines*

78. Guidelines 5 and 6 recommend use of the Court-to-Court Communication Guidelines<sup>17</sup> to facilitate communication between courts and that insolvency representatives should communicate freely and openly with debtors and other insolvency representatives to ensure cooperation and coordination. Creditors should support such cross-border communication among debtors and insolvency representatives. Guideline 20 recommends that where a group has assets in more than one country, or requires assistance from the court with respect to its reorganization or liquidation, the courts should cooperate in the same manner as they are required to cooperate under the UNCITRAL Model Law with respect to a single debtor.

(b) **Notes**

79. Part three contains quite detailed recommendations and discussion of cooperation and coordination in the group context that provides an appropriate basis for further discussion.

**2. Use of cross-border insolvency agreements to clearly define procedures and roles**

(a) **Provisions**

(i) *Model Law*

80. Article 27, subparagraph (d), of the Model Law suggests, as one means of implementing cooperation, the approval or implementation by courts of agreements concerning the coordination of proceedings.

(ii) *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*<sup>18</sup>

81. The Practice Guide compiles, in some detail, best practice on the use of such agreements.

(iii) *Legislative Guide, part three*

82. Recommendations 253 and 254 authorize insolvency representatives and other parties in interest to enter into cross-border agreements covering multiple members of an enterprise group (recommendation 253) and courts to approve or implement such agreements (recommendation 254).

(iv) *EC Regulation proposal*

83. Chapter IVa addresses the insolvency of members of a group of companies. Article 42a, paragraph 1, includes, in the context of cooperation and communication between insolvency representatives, authorization for cooperation in the form of agreements or protocols. Article 42b, subparagraph 3 (d), includes, in the context of communication and cooperation between courts, cooperation by means of coordination of the approval of agreements.

(v) *MEG Guidelines*

84. Guideline 7 provides for courts to direct, authorize or permit the debtor or insolvency representative to enter into agreements with other group members to further the objectives of the Guidelines. Guideline 8 provides that where the court is not permitted to authorize or direct parties in accordance with Guideline 7, debtors or insolvency representatives should initiate such agreements where permitted.

<sup>17</sup> Available at [www.iiiglobal.org/component/jdownloads/viewcategory/394.html](http://www.iiiglobal.org/component/jdownloads/viewcategory/394.html).

<sup>18</sup> Available from [www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/2009PracticeGuide.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2009PracticeGuide.html).

(b) **Notes**

85. The provisions quoted above indicate widespread support for the use of agreements in cross-border insolvency cases and provide abundant material for further discussion.

**I. Reorganization**

**1. Provision for joint/coordinated disclosure statements and plans of reorganization**

(a) **Provisions**

(i) *Legislative Guide, part three*

86. Recommendation 237 addresses this issue in the context of domestic enterprise groups; there is no equivalent recommendation in Chapter III dealing with international issues, although it is addressed in terms of coordination between insolvency representatives. Recommendation 250 (e) refers to one means of cooperation between insolvency representatives in the cross-border context as being “coordination with respect to the proposal and negotiation of reorganization plans.”

(ii) *EC Regulation proposal*

87. Chapter IVa of the proposal addresses the insolvency of members of an enterprise group. Article 42a, subparagraph 2 (b), provides that in pursuance of cooperation, insolvency representatives should explore the possibilities for reorganizing the group and where such possibilities exist, coordinate with respect to the proposal and negotiation of a coordinated reorganization plan. Article 42d, subparagraph 1 (c), provides the insolvency representative with the right to, inter alia, propose a reorganization plan or other measure for all or some members of the group for which insolvency proceedings have commenced and to introduce it into any of the proceedings commenced with respect to other members of the same group in accordance with law applicable to those proceedings. The insolvency representative may also request any additional procedural measure under the law referred to in subparagraph (c) that may be necessary to promote reorganization.

(iii) *NAFTA Principles*

88. **Recommendation 5: Binding Effect of Plans**

*The NAFTA countries should adopt provisions requiring approval of main proceeding reorganization plans by courts in non-main proceedings despite a lack of compliance with rules for approval of such plans under domestic law if (a) the plan distribution will include significant value from assets or operations from outside the approving country; (b) the plan has been approved under the voting requirements of the law of the main proceeding; (c) creditors and other interested parties from the approving country have had a fair and reasonable opportunity to participate in the main proceeding; and (d) the plan does not discriminate unfairly on the basis of national citizenship, residence, or domicile. The provisions should also make such a plan final and binding in the approving country on the rights of all parties interested in the debtor's affairs to the same extent as it is under the law of the main proceeding.*

(b) **Notes**

89. Paragraphs 147 to 151 of Chapter II (Domestic issues) of the commentary to part three discuss a number of the issues connected with preparation and approval of joint and coordinated reorganization plans.

90. Material concerning the coordination of reorganization plans in the cross-border context was included in the following documents relating to part three: A/CN.9/WG.V/WP.76/Add.2, paragraphs 28-32; A/CN.9/WG.V/WP.82/Add.4, paragraphs 33-36.

91. At its thirty-fifth session the Working Group concluded that in the international context “provided the proceedings commenced in different jurisdictions were



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reorganization proceedings, all group members could propose the same plan, subject to domestic law with respect, for example, to priorities. The Working Group agreed that that approach should be discussed in the commentary, together with the role of cross-border agreements, cooperation and coordination” (A/CN.9/666, para. 110). Paragraph 51(h) of Chapter III refers to “coordination and harmonization of reorganization plans” as being one area of cooperation that might be addressed in a cross-border insolvency agreement.

**F. Note by the Secretariat on mechanisms suitable for the insolvency of micro, small and medium-sized enterprises: the UNCITRAL Legislative Guide on Insolvency Law**

**(A/CN.9/WG.V/WP.121)**

**[Original: English]**

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**Background**

1. At its forty-sixth session (2013), the Commission discussed issues related to the insolvency of micro, small and medium-sized enterprises (MSMEs) and requested Working Group V to conduct, at its session to be held in the first half of 2104, a preliminary examination of relevant issues, and in particular to consider whether the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide) provided sufficient and adequate solutions for such enterprises. If it did not, the Working Group was requested to consider what further work and potential work product might be required, as noted above, to streamline and simplify insolvency procedures for such enterprises. Its conclusions on those issues were to be included in its progress report to the Commission in 2014 in sufficient detail to enable the Commission to consider what future work might be required, if any.<sup>1</sup>

2. The insolvency of MSMEs can raise concerns that may not be specifically considered in existing insolvency regimes. The smaller size of such enterprises makes them more vulnerable to the cash flow problems inherent in insolvency and less able to withstand complex, lengthy and expensive proceedings, leading some to suggest that resort to informal insolvency processes might be of assistance for MSMEs. In addition, many MSMEs are non-corporate entities or sole proprietorships, and do not enjoy legal personality or limited liability protection, and even where the MSME is a corporate entity, access to credit may be made subject to the granting of personal guarantees to creditors by the MSME owners or their relatives and friends. In such cases, MSME debt may accrue to individuals for life and may not be subject to discharge. Additional issues which may arise in the case of MSMEs are that it may be difficult to separate their business debt from their personal debt, and that the insolvency of non-corporate enterprises is usually regulated under personal insolvency regimes, even though it may be in relation to MSME business debt. Further, where personal insolvency frameworks must be relied upon to regulate MSME insolvencies, such frameworks may not provide temporary protection from creditors, nor allow for the proposal of a plan of reorganization.

3. Broadly speaking, the main concerns for MSMEs in insolvency in relation to the Legislative Guide can be said to consist of speed, flexibility and cost of the insolvency mechanism, as well as providing a fresh start for debtors through discharge. The following analysis of the Legislative Guide (using the headings and numbering used in the Guide) focuses on the extent to which these concerns may already be treated in the text and notes additional issues related to MSMEs that may touch upon certain aspects already addressed in the Legislative Guide. Finally, a list

<sup>1</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No.17 (A/68/17)*, para. 326.

of issues which the Working Group may wish to consider in its discussion of this topic is provided.

## **I. MSME issues as currently considered in the Legislative Guide**

### **Introduction to the Legislative Guide**

4. The Introduction to the Legislative Guide addresses the following issues of interest in the MSME context:

(a) The Legislative Guide focuses on insolvency proceedings commenced under the insolvency law and conducted in accordance with that law, against a debtor, whether a legal or natural person, that is engaged in economic activity — i.e. natural persons are covered;<sup>2</sup>

(b) The non-legislative measures necessary for successful implementation of an insolvency regime may be of particular importance in the MSME context (adequate institutional infrastructure, organizational capacity, technical professional expertise and appropriate human and financial resources);<sup>3</sup> and

(c) The Legislative Guide assumes as a general principle that there is reliance on court supervision throughout the insolvency proceedings, but notes that alternatives to that approach may be considered where, for example, the courts are unable to handle insolvency work (whether for reasons of lack of resources or lack of requisite experience) or supervision by some other authority is preferred.<sup>4</sup>

### **Part one: Designing the key objectives and structure of an effective and efficient insolvency law**

#### **I. Key objectives of an effective and efficient insolvency law**

5. In the Introduction to part one of the Legislative Guide, it is noted that a debtor (which would include MSMEs) and its creditors must be included in the scope of the legal mechanism regulating insolvency in order for them to be both subject to the discipline of the mechanism and to enjoy the protections provided by the mechanism. In addition, the Legislative Guide draws a distinction between formal insolvency proceedings, which are those commenced under the insolvency law and governed by that law, and informal insolvency processes, which are not regulated by the insolvency law and will generally involve voluntary negotiations between the debtor and some or all of its creditors. The Guide also observes that the effectiveness of such voluntary negotiations depends on the existence of an insolvency law, which can provide indirect incentives or persuasive force to achieve reorganization.<sup>5</sup>

6. It should also be noted that timeliness and efficiency, two of the issues most critical in MSME insolvencies, are included as key objectives in establishing and developing an effective insolvency law.<sup>6</sup>

## **II. Mechanisms for resolving a debtor's financial difficulties**

### **B. Voluntary restructuring negotiations**

7. Voluntary restructuring negotiations (VRNs) are included in the Legislative Guide as a mechanism for resolving a debtor's financial difficulties and an alternative to formal reorganization proceedings under the insolvency law. These allow creditors to negotiate with each other and with the debtor to restructure the debtor, with or without rearrangement of the financing. While the use of VRNs has been generally limited to cases of corporate financial difficulty or insolvency in which there is a

<sup>2</sup> UNCITRAL Legislative Guide on Insolvency Law, Introduction, para. 1.

<sup>3</sup> *Ibid.*, para. 5.

<sup>4</sup> *Ibid.*, para. 7.

<sup>5</sup> UNCITRAL Legislative Guide, part one, chapter I, paras. 1-2.

<sup>6</sup> *Ibid.*, paras. 8-9 and recommendation 1(e).

significant amount of debt owed to banks and financiers, such mechanisms could be adapted for MSMEs and introduce flexibility into an insolvency regime.<sup>7</sup>

#### **D. Administrative processes**

8. The Legislative Guide also makes reference to, but does not discuss in detail, the use of administrative processes, or semi-official “structured” forms of insolvency processes, that have been developed in a number of crisis-affected jurisdictions to deal with systemic financial problems within the banking sector. Although these processes are complex and involve the development of special rules and regulations that would not be directly applicable to the MSME context,<sup>8</sup> they could provide a model for additional and more flexible processes to deal with MSME insolvency outside of the formal court system.

### **III. Institutional framework**

9. It is noted in the Legislative Guide that designing an appropriate insolvency law requires consideration of the extent to which the courts will need to supervise the proceedings and whether or not their role can be limited with respect to different parts of the proceedings or balanced by the role of other participants. For example, an insolvency law could assign specific functions to other participants, or to some non-court authority such as an insolvency or corporate regulator.<sup>9</sup> This type of flexible approach could possibly be adapted to the context of MSME insolvency, and provide for a less formal, but nonetheless supervised, regime.

#### **Part two: Core provisions for an effective and efficient insolvency law**

##### **I. Application and commencement**

###### **A. Eligibility and jurisdiction**

10. The Legislative Guide sets out which debtors are eligible to be covered by an insolvency law. In doing so, it focuses on the conduct of economic activities by both legal and natural persons, regardless of the legal structure through which those activities are conducted, and would thus include all forms of MSMEs. In its discussion of the eligibility of natural persons engaged in economic activities, the Guide outlines a number of issues of particular relevance to MSMEs, including policies applicable to individual or personal debt and insolvency, the difficulty of discerning between business and consumer debt, and potential personal liability for debt incurred.<sup>10</sup> In terms of jurisdiction, the test for “centre of main interests” of the debtor is the debtor’s registered office or, in the case of an individual, their habitual residence.<sup>11</sup>

###### **B. Commencement of proceedings**

11. The requirements for access to insolvency proceedings (and the type of proceeding that may be appropriate) may need to be considered in the context of MSMEs, as the burden of proving insolvency in order to commence insolvency proceedings may be too time-consuming and too expensive for MSMEs to meet and reorganization may only be possible where there is an early application. In addition, a balance sheet test of an MSME debtor’s insolvency could be problematic given that a natural person’s personal assets and liabilities may be mingled with those of the business. Further, when the business is doing poorly but the individual debtor is asset-rich, a balance sheet analysis could preclude access to insolvency proceedings or debt adjustment.<sup>12</sup>

12. Where creditors seek to commence insolvency proceedings in respect of a natural person engaged in an MSME, their incentive to do so will depend upon the

<sup>7</sup> UNCITRAL Legislative Guide, part one, chapter II, paras. 2-18.

<sup>8</sup> *Ibid.*, paras. 37-38.

<sup>9</sup> UNCITRAL Legislative Guide, part one, chapter III, paras. 3-4.

<sup>10</sup> UNCITRAL Legislative Guide, part two, chapter I, paras. 3-7 and recommendation 8.

<sup>11</sup> *Ibid.*, para. 13 and recommendation 11.

<sup>12</sup> *Ibid.*, paras. 25-26.

ease with which debts are subject to collection outside of the insolvency context, and the extent to which discharge is available in the context of an insolvency proceeding. Where the MSME is run by a married couple, permitting them to apply to commence insolvency proceedings jointly may be appropriate to procedurally coordinate two related proceedings and facilitate distribution to joint creditors.

13. The Legislative Guide notes a situation that could be particularly relevant in the case of MSME debtors, that is, where there are insufficient assets to fund the administration of insolvency proceedings. In such cases, creditors may be reluctant to initiate proceedings or debtors may be loath to commence them, and some insolvency laws require the denial of an insolvency application when there are insufficient assets in the estate to fund the processes. The Guide outlines several different mechanisms for pursuing the administration of such estates, including levying a surcharge on creditors to fund the administration; establishing a public office or using an existing office; establishing a fund out of which the costs could be met; or appointing a listed insolvency professional on the basis of a roster or rotation system.<sup>13</sup>

### **C. Applicable law in insolvency proceedings**

14. The applicable law in insolvency proceedings may have to be considered in certain MSME-specific contexts. In cases where a natural person engaged in an MSME has connections to two or more States, it may be uncertain which court is competent to adjudicate insolvency relief, which law should be applicable in the insolvency proceeding, and the circumstances pursuant to which a discharge of the debtor entered in one State will be enforced or recognized in another. In addition, the laws excluding certain assets from the insolvency estate may raise special problems, as some States view such laws as part of the insolvency law, while others consider such laws as a part of the broader procedural or collection laws applicable in an insolvency context.

## **II. Treatment of assets on commencement of insolvency proceedings**

### **A. Assets constituting the insolvency estate**

15. The Legislative Guide provides that the insolvency law may exclude certain assets from the estate, but notes that insolvency laws differ on this point. Where a natural person is the debtor, the excluded assets may include those necessary for the debtor to earn a living, as well as personal and household assets. These issues may be of particular importance to MSME debtors who may not own many assets in excess of the value of their homes.<sup>14</sup> States should be encouraged to specify the treatment of such assets. In addition, whether certain conduct on the part of the natural person, such as bad faith conduct, should affect the protected status of the exempted property might also be considered.

### **B. Protection and preservation of the insolvency estate**

16. In light of the importance of personal guarantees in securing MSME debt, an issue for consideration might be whether an insolvency law should permit a court to extend the reach of a stay to protect the guarantor of an MSME debtor, as well as the circumstances of any such extension. This discretion could assist in the successful reorganization of MSMEs by staying the enforcement of such guarantees, which are often crucial to MSME financing, in appropriate circumstances.<sup>15</sup>

### **C. Use and disposal of assets**

17. Where an MSME debtor is a natural person, the commencement of insolvency proceedings is likely to include both personal and business assets. Permitting the use of both types of assets in reorganization cases, and the use of personal assets even

<sup>13</sup> Ibid., paras. 72 and 75 and recommendation 26.

<sup>14</sup> UNCITRAL Legislative Guide, part two, chapter II, paras. 18-19 and recommendation 38.

<sup>15</sup> Ibid., paras. 30-34 and recommendations 46 and 48.

when the liquidation of business assets is certain might be considered,<sup>16</sup> with provision for the business assets to be sold before personal assets.

#### **D. Post-commencement finance**

18. Consideration might be given, in the situation where an MSME debtor is a natural person, to providing access to a credit card or other source of credit during the pendency of an insolvency or a debt adjustment proceeding.

#### **E. Treatment of contracts**

19. An additional issue for consideration might be the treatment to be accorded to covenants not to compete contained in partnership agreements or other contracts. In addition, provision for the distinct claims by and against partners in this context might be addressed.

#### **F. Avoidance proceedings**

20. An additional issue for consideration might be the circumstances pursuant to which avoidance of encumbrances on certain property exempt from the insolvency estate might be appropriate.

### **III. Participants**

#### **A. The debtor**

21. The MSME context increases the importance of including the debtor in any insolvency proceeding, and particularly in a reorganization proceeding, so as to profit from the debtor's detailed knowledge of its business and the relevant market or industry, as well as its ongoing relationship with creditors, suppliers and customers.<sup>17</sup>

#### **B. Insolvency representative**

22. The means of payment of the insolvency representative can pose particular problems for MSME insolvencies, which may not have a large number of assets in the estate. The Legislative Guide outlines different approaches that can be taken to payment of the insolvency representative, noting that in situations where debtors have insufficient assets to pay for the administration of the estate, it may be possible to pay the insolvency representative from a fund maintained for that purpose by the State.<sup>18</sup>

23. Training specific to MSME insolvencies might be suggested for insolvency representatives, particularly where such enterprises play an important role in the economy and as a result of their nature may be more likely to require insolvency proceedings.

#### **C. Creditors: participation in insolvency proceedings**

24. In the case of MSME insolvencies, the debtor may be too small to justify the expense of establishing a creditor committee. In such circumstances, permitting the approval of debt adjustment plans without seeking creditors' votes on the proposal, but allowing creditors to appear as a party in interest with standing to object to the proposed plan might be considered.

<sup>16</sup> *Ibid.*, paras. 75-78 and recommendation 52.

<sup>17</sup> UNCITRAL Legislative Guide, part two, chapter III, paras. 2-9 and recommendation 109, which states that the insolvency law should specify that the debtor is entitled to retain those assets excluded from the estate by the law. The World Bank Report on the Treatment of the Insolvency Natural Persons (2013) discusses extensively exemption policy, and could be considered in the context of possibly expanding upon recommendation 109. (To access the World Bank Report, see [http://siteresources.worldbank.org/INTGILD/Resources/WBInsolvencyOfNaturalPersonsReport\\_01\\_11\\_13.pdf](http://siteresources.worldbank.org/INTGILD/Resources/WBInsolvencyOfNaturalPersonsReport_01_11_13.pdf).)

<sup>18</sup> UNCITRAL Legislative Guide, part two, chapter III, para. 58 and recommendation 125.

#### **IV. Reorganization**

##### **A. The reorganization plan**

25. MSME owners that have the confidence of creditors are sometimes permitted and encouraged to retain some ownership interest in the debtor. Additional issues that could be discussed in the MSME context could include permitting: (a) deviation from the absolute priority rule under limited circumstances; (b) MSME owners to have the exclusive right to propose a plan of reorganization for a limited period of time; and (c) owners of the MSME to remain as debtors in possession.

26. Time will be one of the most important factors in the reorganization of MSME debtors, both with respect to early application for reorganization and the length of time the process takes. The particular importance of incentives to encourage early filing might be emphasized. As to the conduct of the process, the Legislative Guide considers the issue of the setting of deadlines by which debtors must submit their reorganization plans, and recommends that a time period should be fixed by the insolvency law but that the court should be authorized to extend the time period in appropriate circumstances.<sup>19</sup> Time periods in the case of MSME debtors could be shorter than in the case of larger insolvencies, since MSMEs tend to have less complicated operations and financial arrangements and creditors might themselves be small businesses that cannot withstand long periods without payment during a reorganization process.

27. Without intending to dictate the contents of a plan of reorganization, basic forms to serve as templates for plans of reorganization for MSMEs might be provided.<sup>20</sup> In addition, less formal record-keeping and disclosure of information could be required of MSME debtors than is required of larger enterprises, and in light of the relative simplicity of MSME insolvencies, the need for transparency is reduced and an additional disclosure statement for creditors' review might not be required.<sup>21</sup> Multiple classes of unsecured claims may be unnecessary in most MSME reorganization plans, and in such cases, there may be no need for the insolvency law to provide for confirmation despite creditor dissent.<sup>22</sup> In addition, voting on an MSME plan of reorganization could be kept very simple, or could even be dispensed with in cases where the court is required to approve the plan according to a specific standard.<sup>23</sup> Secured creditors should be involved in any MSME reorganization, and bearing in mind the family nature of many MSMEs, the treatment of claims held by related persons might be dealt with in greater detail (see paras. 29 and 30 below).<sup>24</sup>

##### **B. Expedited reorganization proceedings**

28. In conjunction with the VRNs outlined above (see para. 7), the Legislative Guide advocates expedited reorganization proceedings as a means of limiting the costs and delays that can be associated with insolvency proceedings. Insolvency laws can include expedited proceedings in order to confirm VRNs; this additional speed and reduced cost could also be an advantage in the MSME insolvency context. Expedited proceedings could be examined for possible simplification for MSME insolvencies, for example, by doing away with court supervision of a negotiated restructuring as long as a super-majority of creditors approve the agreement reached.<sup>25</sup>

<sup>19</sup> UNCITRAL Legislative Guide, part two, chapter IV, paras. 15-16 and recommendation 139.

<sup>20</sup> *Ibid.*, paras. 18-22 and recommendation 144.

<sup>21</sup> *Ibid.*, paras. 23-25 and recommendation 141.

<sup>22</sup> *Ibid.*, paras. 56-64 and recommendation 152.

<sup>23</sup> *Ibid.*, paras. 26-51 and recommendation 145.

<sup>24</sup> *Ibid.*, para. 46.

<sup>25</sup> *Ibid.*, paras. 76-94 and recommendations 160-168.

**V. Management of proceedings****A. Treatment of creditor claims****3. Verification and admission of claims****(f) Claims requiring special treatment**

29. Subsection (ii) of this section of the Legislative Guide concerns creditor claims made by persons related to the debtor, whether in a familial or business capacity. For the reasons noted earlier (see para. 2), claims by related persons may be of particular importance in the MSME context. The Guide acknowledges that the mere fact of a special relationship is not sufficient in all cases to justify special treatment of a creditor's claim and that in some cases such claims will be entirely transparent and should be treated in the same manner as similar claims made by creditors who are not related persons.<sup>26</sup>

**B. Priorities and distribution of proceeds****1. Priorities****(c) Ranking of claims**

30. Related to the discussion in the paragraph above is subsection (iv) of this section of the Legislative Guide, which concerns the ranking of claims made by persons related to the debtor, whether in a familial or business capacity. Some insolvency laws always subordinate such claims, while others subordinate such claims only on the basis of inequitable conduct or fraudulent or quasi-fraudulent conduct.<sup>27</sup> In the context of MSMEs, it may be desirable to consider in greater detail the question of guarantors of MSME debt.

**C. Treatment of corporate groups in insolvency (and Part three: Treatment of enterprise groups in insolvency)**

31. An issue that may arise in the context of MSMEs and the treatment of enterprise groups stems from the possible reliance of MSME debtors on a borrowing circle of individuals whose debts are connected to each other by cross-default provisions. The treatment of such "group debt" may need to be addressed in the MSME context.<sup>28</sup>

**VI. Conclusion of proceedings****A. Discharge**

32. The Legislative Guide notes increasing awareness of the need to recognize business failure as a natural feature of an economy and that several States have taken the view that their insolvency regime must also focus upon facilitating a fresh start for insolvent debtors by clearing their financial situation and taking other steps to reduce the stigma associated with business failure. The Guide contains detailed information in respect of discharge where the debtor is a natural person;<sup>29</sup> this information may need to be expanded in order to fully take into account the issue of MSME insolvency, particular where the MSME is conducted through a natural person. For example, it may be desirable to consider issues such as cross-border recognition of discharge (see also para. 14 above).<sup>30</sup>

<sup>26</sup> UNCITRAL Legislative Guide, part two, chapter V, para. 48 and recommendation 184.

<sup>27</sup> *Ibid.*, para. 77 and recommendation 189.

<sup>28</sup> *Ibid.*, paras. 82-92 and Part three: Treatment of enterprise groups in insolvency.

<sup>29</sup> UNCITRAL Legislative Guide, part two, chapter VI, paras. 4-13 and recommendations 194-196.

<sup>30</sup> Report of the 44th session of Working Group V, A/CN.9/798, para. 28.



## **II. MSME issues not currently considered in the Legislative Guide**

33. The following issues are not currently addressed in the Legislative Guide and may be considered for further discussion in the MSME debtor context:

- (a) Treatment of group debt (see para. 31 above);
- (b) Debt adjustment mechanisms for natural persons to facilitate repayment of debt over time with the possibility of a discharge for debt that cannot be repaid over a defined period (e.g. 3 years);
- (c) Possible approaches that could be taken to establish (or extend) informal insolvency processes; and
- (d) Personal insolvency and whether appropriate mechanisms are necessary in order to adequately deal with MSME insolvency.

## **III. Issues for possible discussion**

34. The Working Group may wish to consider the following non-exhaustive list of issues in its discussion:

- (a) Does the Legislative Guide provide sufficient and adequate solutions for MSME insolvencies?
- (b) If additional solutions are necessary, what form should they take? Could these solutions be addressed, for example, by extending the existing commentary or are additional recommendations required?
- (c) Are there issues additional to those enumerated above that relate to MSME insolvency and are not currently addressed in the Legislative Guide? Should those issues be included in any additional work product? and
- (d) Should any additional work required take the form of a further part of the Legislative Guide (e.g. part five) or a separate work product focusing on MSMEs?

## **G. Comments of the United States of America on A/CN.9/WG.V/WP.120**

**(A/CN.9/WG.V/WP.122)**

**[Original: English]**

1. In 2010, the UNCITRAL Commission authorized Working Group V to commence work on a set of issues that would possibly include “a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition.”<sup>1</sup> After completing other work within its mandate, in December 2013 Working Group V returned to this idea and decided that it should commence work on such a project in order to facilitate the cross-border insolvency of multinational enterprise groups. In its report, the Working Group identified a number of key issues that should be components of that work.<sup>2</sup> The United States of America thanks the Secretariat for providing the Working Group with A/CN.9/WG.V/WP.120, which will greatly facilitate the Working Group’s discussion of these issues at our forty-fifth session.

2. In advance of the session, the United States would like to reiterate its strong support for this project and to provide a few brief comments highlighting several of the issues noted in A/CN.9/WG.V/WP.120 as critical to the Working Group’s early consideration during this session. We believe that a thorough discussion of these areas would provide a useful starting point for the Working Group’s efforts, as many of the other issues highlighted in A/CN.9/WG.V/WP.120 build upon these topics.

### **A. Jurisdiction and standing**

3. We believe that the Working Group should explore the approach set forth by the Secretariat in A/CN.9/WG.V/WP.120 and develop a mechanism through which members of an enterprise group may voluntarily subject themselves to the jurisdiction of a court in a pending insolvency proceeding of an enterprise group member. The Working Group would need to consider a number of issues in developing such a framework. First, the framework would need to ensure access and standing for each of the enterprise group members that elect to participate in pending insolvency proceedings involving any enterprise group member. A key part of this element would be ensuring that the court would have the ability to exercise jurisdiction over the enterprise group members. Further, the distinction between main and non-main proceedings may not be relevant or necessary where enterprise group members have elected to submit to the jurisdiction of a court conducting a group member’s insolvency proceeding. The voluntary participation of group members in one proceeding should also eliminate the need for the Working Group to expend much effort in defining the “parent” of an enterprise group. In addition, as enterprise groups may have dozens or even hundreds of nominally separate members, procedures should be put in place for administering complex enterprise group insolvencies in a fair yet practical manner, while still respecting the separate identity of group members.

### **B. Synthetic proceedings**

4. As discussed in section D(1) of A/CN.9/WG.V/WP.120, the concept of synthetic proceedings could provide a useful tool for the Working Group to include in any set of model provisions aimed at facilitating the cross-border insolvency of enterprise groups. Synthetic proceedings could save time and costs, as well as reduce the complexity of coordination between multiple proceedings. Given the potential benefits of using synthetic proceedings, and the experiences that some jurisdictions have already had with this approach, we believe that the Working Group should

<sup>1</sup> See A/65/17, pp. 51-52, Report of the United Nations Commission on International Trade Law, 43rd Session (21 June-9 July 2010).

<sup>2</sup> See A/CN.9/798, pp. 5-6, Report of Working Group V (Insolvency Law), 44th Session (16-20 December 2013).

consider express provisions regarding this concept as one of the core elements of our work in this area. Although the present law of certain nations may be able to provide foreign creditors with the distribution to which they would have been entitled if separate proceedings had been commenced in their home countries, express provisions to this effect could be useful.

5. In developing an approach that would enable the use of synthetic proceedings, we believe the Working Group will need to consider some difficult questions. For example, synthetic proceedings will need to incorporate safeguards to ensure that the interests of all relevant jurisdictions will be taken into account, while still making the process functional. Thus, we believe that the Working Group would benefit from an early discussion of the elements that would be needed for such a process and how it would interact with the jurisdictional and standing elements discussed above.

### **C. Cooperation and coordination among enterprise group members**

6. In those circumstances where proceedings in more than one country are unavoidable, the Working Group can continue to build upon the existing provisions of the UNCITRAL Model Law on Cross-Border Insolvency with respect to the mandate of cooperation and coordination between courts and estate administrators. Recommendations 240-245 of the UNCITRAL Legislative Guide on Insolvency Law currently contain principles that recognize that courts and the administrators of affiliated estates should cooperate, especially where reorganization of the enterprise as a going concern is a realistic possibility. More specific provisions could be drafted, building on suggestions contained in A/CN.9/WG.V/WP.120: (i) the concept of a coordinating proceeding with the responsibility of attempting to administer the enterprise for the benefit of all of its constituent parties; (ii) facilitation of financing jointly attained by members of an enterprise group whether or not a party to insolvency proceedings in more than one country; and (iii) relief provided to group members collectively.



## VI. MICRO, SMALL AND MEDIUM-SIZED ENTERPRISES (MSMEs)

### A. Report of Working Group on MSMEs on the work of its twenty-second session (New York, 10-14 February 2014)

(A/CN.9/800)

[Original: English]

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### I. Introduction

1. At its forty-sixth session, in 2013, the Commission requested that a working group should commence work aimed at reducing the legal obstacles encountered by micro, small and medium-sized enterprises (MSMEs) throughout their life cycle.<sup>1</sup> At that session, the Commission took note of the broad consensus among the participants at the second UNCITRAL colloquium on microfinance, organized in Vienna in January 2013, that such a working group should be established.

2. At that same session, the Commission agreed that consideration of the issues pertaining to the creation of an enabling legal environment for MSMEs should initially focus on legal questions surrounding the simplification of business incorporation and registration. It was further agreed that other topics to be considered in the context of MSMEs at a later date included: (a) a system for resolving disputes between borrowers and lenders; (b) effective access to financial services; (c) guidance on ensuring access to credit; and (d) insolvency.<sup>2</sup>

3. As noted in the materials before the Commission and during its deliberations at its forty-sixth session, in 2013, in addition to reducing barriers to MSMEs entering the formal economy and thus, inter alia, helping them to maximize their economic potential, work on the simplification of business incorporation and registration could have additional salutary international effects. In particular, it was noted that an internationally recognized form of business registration could be expected to facilitate cross-border trade for MSMEs operating in regional markets, since it would provide

<sup>1</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 321.

<sup>2</sup> For a history of the evolution of the topic of MSMEs on the UNCITRAL agenda, see A/CN.9/WG.I/WP.80, paras. 5-12.

a recognizable international basis for transactions and avoid problems that may arise because of a lack of recognition of the business form of the enterprise.<sup>3</sup>

## II. Organization of the session

4. Working Group I, which was composed of all States members of the Commission, held its twenty-second session in New York from 10-14 February 2014. The session was attended by representatives of the following States Members of the Working Group: Armenia, Australia, Brazil, Canada, China, Colombia, Denmark, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Mexico, Nigeria, Pakistan, Panama, Paraguay, Republic of Korea, Russian Federation, Spain, Switzerland, Thailand, Uganda and United States of America.

5. The session was attended by observers from the following States: Chile, Dominican Republic, Finland, Guatemala, Libya, Madagascar, Poland, Romania, Serbia, Uruguay and Viet Nam.

6. The session was attended by the following non-member States having received a standing invitation to participate as observer in the sessions and the work of the General Assembly: Holy See.

7. The session was also attended by observers from the following international organizations:

(a) *Organizations of the United Nations system: World Bank;*

(b) *Invited intergovernmental organizations:* International Cotton Advisory Committee, League of Arab States, Organization of American States and World Customs Organization;

(c) *Invited international non-governmental organizations:* American Bar Association (ABA), Centro de Estudios de Derecho Economía y Política (CEDEP), Commercial Finance Association (CFA), Fondation pour le Droit Continental, National Law Center for Inter-American Free Trade (NLCIFT), New York State Bar Association (NYSBA) and The Association of the Bar of the City of New York (ABCNY).

8. The Working Group elected the following officers:

*Chair:* Ms. Maria Chiara Malaguti (Italy)

*Rapporteur:* Mr. Francisco Reyes (Colombia)

9. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.80);

(b) A note by the Secretariat concerning selected activities of international and intergovernmental organizations to promote MSMEs (A/CN.9/WG.I/WP.81);

(c) A note by the Secretariat on the features of simplified business incorporation regimes found in selected States, as well as empirical information concerning their use (A/CN.9/WG.I/WP.82); and

(d) Observations by the Government of Colombia concerning the Colombian Simplified Corporation (A/CN.9/WG.I/WP.83).

10. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.

<sup>3</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, paras. 316-319; Note by the UNCITRAL Secretariat, Microfinance: creating an enabling legal environment for micro-business and small and medium-sized enterprises, A/CN.9/780, para. 10.

4. Preparation of legal standards in respect of micro, small and medium-sized enterprises (Simplification of business incorporation and registration).
5. Other business.
6. Adoption of the report.

### **III. Deliberations and decisions**

11. The Working Group engaged in discussions in respect of the preparation of legal standards aimed at the creation of an enabling legal environment for MSMEs, in particular on the simplification of business incorporation and registration regimes, on the basis of Secretariat documents A/CN.9/WG.I/WP.81 and A/CN.9/WG.I/WP.82, and of the observations of the Government of Colombia in A/CN.9/WG.I/WP.83. The deliberations and decisions of the Working Group on these topics are reflected below.

## **IV. Preparation of legal standards in respect of micro, small and medium-sized enterprises (Simplification of business incorporation and registration)**

### **A. Micro, small and medium-sized enterprises in the global context**

12. The Secretariat highlighted certain aspects of document A/CN.9/WG.I/WP.81, which provided a non-exhaustive survey of initiatives of intergovernmental, regional and international organizations in support of MSMEs. UNCITRAL's proposed work on MSMEs could be placed in the broader context of the United Nations work on sustainable development and inclusive finance, including the preparation of the Post-2015 Development Agenda. Furthermore, as considered during the 2013 UNCITRAL colloquium on microfinance and as noted at the forty-sixth session of the Commission (in 2013) such work could contribute to reinforcing the rule of law at the country level.

13. Reference was made to United Nations General Assembly resolution 67/202, which focused on the contribution of entrepreneurship to sustainable development, calling for the creation of an enabling environment for entrepreneurs, including MSMEs, by addressing legal, social and regulatory barriers. In addition, United Nations work to promote cooperatives was noted, in particular in respect of the 2012 International Year of Cooperatives, which stressed the contribution of cooperatives to economic development and poverty eradication and highlighted that they could represent an enterprise model in those areas where the public sector was not able to meet the needs of the population.

14. As noted in A/CN.9/WG.I/WP.81, regional organizations and regional economic organizations supported MSMEs in various ways. However, policy development and the provision of technical assistance seemed to prevail over the drafting of comprehensive legislation addressing the needs and requirements of MSMEs. Among the various organizations reviewed by the Secretariat, only the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) appeared to be working towards such a legislative framework.

15. Similarly, initiatives and projects of international organizations did not seem to focus on assisting the development of new legislative models that would facilitate the establishment and operation of MSMEs in the formal economy. Attention focused mainly on reducing the existing regulatory, economic and administrative barriers that represented a constraint on MSMEs in order to promote their formalization in the medium and long term.

16. In addition to the examples of MSME support included in document A/CN.9/WG.I/WP.81, the World Customs Organization (WCO) advised the Working Group of its Model Business Law Checklist for SMEs. The model was being

developed with a view to assisting Member States in designing, modifying and reviewing customs policies and procedures from the perspective of SMEs. The WCO also informed the Working Group that a research book regarding informal trade would be issued.

17. As A/CN.9/WG.I/WP.81 concluded, the development of an internationally recognized and harmonized approach to creating the legislative infrastructure to foster the development of MSMEs had not yet been fully explored. While individual States had experienced notable success in developing such regimes domestically, little had been done in terms of establishing a means of internationalizing that success. Therefore, the mandate entrusted by the Commission to Working Group I, starting with simplified business registration and incorporation and extending to additional issues, appeared to be a natural complement to existing work being carried out globally and regionally to assist the development and growth of MSMEs.

18. The Working Group expressed its agreement with the conclusions of A/CN.9/WG.I/WP.81. It was observed that the topic of simplified incorporation had a cross-border as well as a domestic dimension, since it could provide MSMEs a recognizable international basis for transactions. For this reason, the topic was said to be relevant for both developing and developed countries and could be expected to enable MSMEs to unleash their full potential.

## **B. Features of simplified and other business incorporation regimes and their impact on MSMEs**

19. The Working Group was also reminded of the main issues raised in document A/CN.9/WG.I/WP.82 in its consideration of features of simplified and other business incorporation regimes and how those features could be relevant to support MSMEs. It was noted that simplified corporate forms were a relatively new type of regime aimed at providing a more flexible and accessible business form for MSMEs, which could also be advantageous for enterprises of a larger size. It was observed that many different types of enterprises could benefit in several ways from the creation of simplified corporate forms, including smaller closely-held companies, family firms, joint ventures and professional service firms.

20. The comparison of different simplified corporate forms contained in document A/CN.9/WG.I/WP.82 was highlighted, noting that the different regimes were examined in respect of three main areas. First, issues of limited liability and other aspects of formation were considered, including legal personality, issues relating to disclosure of financial statements, formation requirements, and the number of founders required pursuant to each legal regime examined. The second main area of comparison focused on internal governance established in each of the legislative schemes, in particular on internal governance itself, on financial rights among owners, on the existence of freedom of contract in establishing the internal governance and on the transferability of the ownership interest. Finally, each separate regime was also examined with a view to the fiduciary duties they required in order to protect the enterprise from abusive or excessively negligent behaviour on the part of managers.

21. Other aspects of document A/CN.9/WG.I/WP.82 were highlighted, such as the suggestion that concerns about the potential of simplified business forms for their abuse in pursuit of criminal activities could be addressed through disclosure of beneficial ownership and sharing of information domestically and internationally. In addition, possible methods of conflict resolution for participants in simplified business forms were noted, including through derivative actions or the existence of exit rules for enterprise owners to withdraw or be expelled from the business. Another approach considered for conflict resolution was the creation of specialized business courts and procedures focused on providing faster, more flexible and expert dispute resolution for participants in simplified corporate forms. Finally, the attention of the Working Group was drawn to various available statistics indicating the success of such simplified business forms in a number of different States.



**General comments on the direction the work could take**

22. Several general observations were made in respect of issues that could be considered by the Working Group in addressing its mandate. The view was expressed that the work, once completed, should include a list of best practices drawn from country experience in this area. In addition, it was observed that SMEs and larger enterprises were more likely to require consideration of international issues than micro-sized enterprises, which were more likely to operate in a more limited scope and thus be subject to the specific context of individual States. Other views were expressed that, although ambitious, the Working Group should consider the possible internationalization of small and micro-sized businesses, particularly in the modern electronic business era, and in respect of craftsmen and others who may add value in the production chain. The Working Group also noted that its work should be undertaken with a view to enhancing the creditworthiness of MSMEs. Finally, two intergovernmental organizations advised the Working Group of their strong interest in, and support of, the work being undertaken.

**Size of the enterprise and application to specific sectors**

23. Some States shared their experience in terms of simplified business forms, some of which were the result of ongoing legislative reforms, whether such efforts were intended specifically to support MSMEs, or for other reasons. In one instance, it was noted that the focus of a State's legislative reform was not based on the size of the business, but on providing appropriate measures for businesses to formalize with minimal capital requirements. Later in the life cycle of such businesses, when they became more successful, they could transition to full limited liability corporations. Other examples were given of the creation of certain categories of companies based on size and the types of business undertaken, but noting that the traditional approach to corporation law had not relied on different sizes of enterprises. In addition, it was observed that some simplified regimes have focused directly on assisting MSMEs, while others were applied to smaller enterprises only after the regimes had been developed for other purposes, yet the net result of both approaches had been positive for MSMEs and larger enterprises. States also observed that, in general, their business incorporation regime did not focus on specific sectors of the economy. Presentations were made by two delegations evidencing that simplified business registration and incorporation had a substantial impact on increasing the registration and incorporation of micro and small businesses in their countries.

24. In general, it was agreed that although a definition of MSMEs was used in certain contexts, including in providing policy support through mechanisms such as subsidies and taxation relief, it was not necessary to approach the simplification of business incorporation with specific company size in mind. The main concern in terms of size of enterprises intended for inclusion in a simplified incorporation regime was to ensure that sole proprietors were considered for inclusion in the regime, even those that might be engaged in relatively simple business activities. It was also observed that some States offered a fairly extensive menu of different legal options to enterprises wishing to formalize, while others appeared to offer fewer alternatives, but enhanced flexibility, to entrepreneurs.

**Limited liability**

25. It was observed that, while limited liability was broadly available and considered to be an important incentive to include in a simplified incorporation regime, some States considered it useful to restrict limited liability to corporations possessing certain features that balanced the enterprise's obligations to stakeholders such as employees, contracting parties, investors or banks. Support was expressed to include mechanisms, such as piercing the corporate veil, to address situations where limited liability might be abused. In addition to limited liability corporations, the Working Group was encouraged to consider including a regime for cooperatives in its discussions on simplified business forms, particularly given the importance of cooperatives in several States.

### **Online registration, single point of entry and standard articles of incorporation**

26. Several States noted that online registration of businesses was quite broadly available, and that many States have dramatically reduced the time necessary for incorporation of a business through the use of electronic means. In States that require notarial services for valid business incorporation, special online conduits have been established between notaries and the relevant authorities to speed the process. A single point of entry for enterprises wishing to formalize has been established in several States; in addition, templates containing standard articles of incorporation are offered in many States to smaller businesses and those with reduced business sophistication.

### **Intergovernmental and cross-border collaboration and information-sharing**

27. It was observed that the sharing of information on the beneficial ownership of enterprises was one method of dealing with the potential misuse of simplified business regimes for illicit purposes. Several States reported requirements for the sharing of such information stemming from either domestic legislation or international commitments. In addition, it was noted that European Union (EU) Directive 2012/17/EU (13 June 2012) required the interconnection of central, commercial and companies registers within the EU; while the information-sharing platform would allow public access, it would not be fully operational for several years.

## **C. Issues relevant to commencing the work**

### **Limited liability and legal personality**

28. Further to the discussion on limited liability in paragraph 25 above, the Working Group continued to explore the issue of limited liability, particularly as it related to legal personality. Limited liability was described as an important risk-reducing system that allowed entrepreneurs to take business risks without fear of failure, but it was noted that many MSMEs were currently excluded from such a protective regime and that efforts should be made to include them. There was general support for the view that limited liability and legal personality offered to MSMEs important advantages in doing business and that it was important to provide access to these advantages to such enterprises.

29. However, it was also noted that some legal regimes linked limited liability to capital requirements, while still providing for partnerships without minimum capital requirements but with no limited liability. Another legal regime allowed streamlined limited liability models for micro-business without reference to legal personality. One example was provided where an entrepreneur possessed no legal personality but could nevertheless protect certain assets from seizure by creditors. Another example was provided of a legal regime in which legal personality had become less relevant and that businesses with no legal personality could still be involved in legal actions and own property. Some interest was expressed in exploring these options as possible solutions.

30. Several delegations emphasized the importance of focusing on the nature of MSMEs and the business environment in which they must operate in order to appropriately assist them. It was noted that enterprises doing business in many legal systems were faced with a range of options from limited companies with capital requirements to limited partnerships to enterprises with no legal personality or limited liability. It was noted that it may not be possible to find one solution for all types of enterprises, and it was suggested that the Working Group may wish to focus on different frameworks for different types of enterprises.

31. It was indicated that exceptions to limited liability varied among jurisdictions. However, it was further suggested that it was not necessary at this stage of the discussion to establish a common understanding of the principles of legal personality or limited liability.

**A single model with a great deal of flexibility**

32. The question was raised in the Working Group whether it would be desirable to focus in its work on a single legislative model, ensuring that it was flexible enough to cover many different types of business.

33. There was some support for the view that a single model with built-in flexibility could be appropriately adapted to all forms of MSMEs. However, it was suggested that having a single flexible model could be both complicated for micro and small businesses and a source of extra cost. Alternatively, it was suggested that it could be possible to create a continuum of different business forms (sole proprietor, partnership and limited liability company) that would accommodate different types of entrepreneurs based on their needs and circumstances. There was some support for that view.

**Model law, legislative guide or another form**

34. The Working Group next considered what form its work on the preparation of legal standards in respect of MSMEs and simplified business incorporation and registration should take. It was noted that UNCITRAL texts represented a fairly broad range of types of instruments, but that the forms most suitable for the work at hand could be a legislative guide or a model law, possibly with a guide to enactment, or some combination thereof.

35. It was observed that efforts had previously been undertaken in a regional economic integration organization to create a single private limited liability company form for the region, but that such efforts had proven difficult. That experience suggested that achieving consensus on a model law could be difficult and that the preferred approach could be to prepare a legislative guide to help policymakers in States prepare regimes suitable for their local needs. An additional suggestion made reference to the same experience, but instead suggested that the Working Group should not focus on simplified incorporation, but rather on the registration of companies and the use of unique identification mechanisms to provide greater transparency and broader, more efficient sharing of information.

36. A preference was also expressed by some delegations for the preparation of a legislative guide over a model law for the reason that model laws might not be widely taken up by States, and since they were said to lack the flexibility that a legislative guide could offer through its commentary and recommendations. This flexibility was said to be particularly important in order to allow States using the legislative guide to adapt the legal approach to the local context and in a manner appropriate for the needs of MSMEs. In addition, it was noted that legislative guides were not static texts, but rather they could be organic and be added to with additional chapters when necessary.

37. A preference was also expressed by other delegations for the preparation of a model law, particularly in light of the fact that there was already an existing example (as provided in A/CN.9/WG.I/WP.83) that had proven effective and could be an appropriate starting point for discussions. It was noted that a model law need not necessarily be a rigid instrument that presented only one approach to a particular issue, but that different options could be accommodated within a single model law, and that this approach would be preferable to preparing a range of model laws from which it might be difficult to choose. It was also observed that, while legislative guides were very useful and contained an enormous amount of information, including best practices, it could be difficult for certain States to effectively use that information to prepare appropriate legislation. The preferred option in these cases could be to offer States a model law that contained the main legislative components and could be easily modified for specific use by States. It was noted that one drawback of adapting model laws to local circumstances was that it would reduce the harmonizing effect of the model law, but that at least the starting point for an adapted model law would have been a single international standard.

38. It was further suggested that the Working Group could prepare both a model law and a legislative guide in order to maximize the information provided and the

flexibility of the materials, but also to provide relatively simple solutions for States wishing to consider an existing legislative scheme rather than preparing one on the basis of information provided in a legislative guide. The Working Group agreed to take its decision on the form of the text to be prepared after it had further considered the issues that would be included in the text, as well as what the text should achieve. However, there was support for the suggestion that the Working Group should consider preparing model articles of incorporation, particularly if they were to be paired with a model law, since such texts could be very helpful for MSMEs.

#### **Use of a possible hybrid business form approach**

39. The question was raised to what extent the Working Group wished to build upon hybrid business forms in order to achieve positive results in terms of simplifying business incorporation and registration to assist MSMEs. It was observed that it might not be necessary to adopt a hybrid business form in order to accommodate these needs, and that the experience of some States indicated that other business forms could be accommodated by adapting existing company law rather than creating a specific hybrid form. However, there was support for the view that hybrid business forms could prove useful even in legal systems where less flexible approaches to business forms were usually taken. It was further stated that hybrid business forms could offer an opportunity for States to move beyond existing business forms that may not adequately support MSMEs in order to create different forms that accomplished that goal.

40. In further explanation of an existing hybrid business form, it was noted that the legal regime was based upon rules from both the common law and continental law traditions, incorporating favourable aspects of both partnership and company law. Freedom of contract in the system described was very broad, and the internal governance system was very flexible, accommodating simple one-person forms as well as more complex structures. In response to the view expressed that less flexible business forms satisfied stakeholders in the market and protected third parties and creditors, it was noted that hybrid business forms were also able to provide adequate protection for creditors and third parties dealing with the enterprise.

#### **Transparency in respect of beneficial ownership**

41. The Working Group also considered the issue of ensuring transparency in respect of beneficial ownership of closely-held corporations. The question was raised whether this issue intended to focus on protecting creditors and other stakeholders dealing with the corporation, or whether the intention was to prevent money-laundering, terrorist activity and other illicit activities involving these types of corporations. It was suggested that the issue should be considered from both perspectives, noting that substantial work in the latter area had been done by the Financial Action Task Force and the G8 (see also paragraphs 26 to 30 of A/CN.9/WG.I/WP.82). It was suggested that these issues were of a regulatory nature, but that the Working Group should remain mindful of them in its work. It was further noted that carefully constructed legal requirements for incorporation in some States could also serve the purpose of providing transparency in such circumstances.

#### **Possible alternative approaches for micro-businesses**

42. Further to the discussion on possible legislative models aimed at the simplification of incorporation for MSMEs in paragraphs 34 to 38 above, the Working Group considered in greater detail possible topics that could be included in such models. Issues raised for the consideration of the Working Group included matters such as incorporation procedures, contents of the formation document of the entity, registration of the business and proof of its existence. Concern was expressed that, while appropriate for the creation of a simplified incorporation regime for small and medium-sized business, several of these issues were possibly too burdensome to meet the needs of micro-entrepreneurs wishing to formalize their businesses. There was support for the view that micro-businesses required a model that was less complex and more specifically designed to meet its needs. It was said that the greatest needs

of micro-entrepreneurs were the ability to set up their business quickly and easily, and to be able to access credit to grow their businesses. Similarly, it was noted that in many States, micro-businesses tended to be sole owners and it was questioned whether it was appropriate to expect a micro-business to seek to be incorporated under such detailed rules, particularly when resorting to them would require some education and business sophistication. It was felt that requiring micro-businesses to incorporate, even in a simplified fashion, could work against bringing such businesses into the formal market. There was support in the Working Group for these views.

43. Suggestions were made that the Working Group could approach its mandate by treating separately the categories of small entrepreneurs and micro-entrepreneurs. It was said that this could accommodate the different needs of these two groups, while still providing each with the possibility of joining the formal economy and of starting a business with limited assets. Consistent with the mandate of the Working Group, the treatment of micro-entrepreneurs could focus on simplified registration, at least as a first step.

44. However, it was suggested that imposing a rigid distinction between micro and small business would not assist in the creation of an enabling legal environment for MSMEs, which should allow for business growth in a progressive cycle, from micro to small and medium. Furthermore, even micro-businesses, including those that are sole proprietors, would need basic formalities in order to establish themselves.

45. In order to maintain a uniform approach by the Working Group to the creation of a legislative model to simplify incorporation for micro and small entrepreneurs, an alternative approach was suggested focusing on issues common to both these types of businesses. These issues included limited liability, legal personality, the protection of third parties and creditors dealing with the enterprise, registration of the business, sole ownership and internal governance issues. Freedom of contract was suggested as an additional topic, since in some countries, entrepreneurs had limited flexibility in the way they could establish and conduct their businesses.

46. Reference was made to several national legislative models applicable to micro and small businesses that might be considered relevant by the Working Group in its further consideration of how best to approach its mandate. For example, it was possible in some States for entrepreneurs to segregate property in certain circumstances, despite not possessing true legal personality. Relevant delegations agreed to submit to the next session of the Working Group documents presenting the distinctive features of those models with a view to facilitating the understanding of the Working Group in respect of how such features could provide alternative forms of organization for micro and small businesses.

### **Business registration**

47. In keeping with its discussion in paragraphs 42 to 46 above, the Working Group was of the view that emphasis should be given in its work to the importance of business registration. It was noted that business registration was key as it was required of enterprises of all sizes wishing to formalize, and that there was no need to treat registration of micro-businesses differently, provided that registration of enterprises could be accomplished quickly and at a low cost. It was also observed that business registration was not a goal unto itself, but that it was intended to provide transparency and a means to establish recognition for a business to enter into a formal environment. While this information would be shared among the relevant authorities for the purposes of taxation and other regulatory measures, it was noted that registration would also assist micro-businesses to obtain financing and access to government assistance programmes such as subsidies and reduced-cost services. However, it was also observed that registration would not necessarily be available to or desirable for all micro-businesses and single person entrepreneurs and that the Working Group should continue to consider additional measures that could help these businesses to formalize.

48. One delegation related its successful experience with recent and significant changes to its business registration system, which other delegations referred to as the

most sophisticated in the region. The system was modernized to permit both electronic and manual registration, and procedures were greatly simplified as well as being provided quickly and at no cost. Another delegation described its more formal model of business registration, which was accomplished through a notary who carefully verified the information, which could then be relied upon to provide transparency for all third parties in their dealings with the business. Moreover, despite its formal nature, business registration could be accomplished in a few days.

49. The Working Group agreed to request the Secretariat to prepare a document for its next session in which best practices in respect of business registration would be examined for further discussion by the Working Group. The following issues were highlighted as being relevant to that future consideration:

- (a) Identification of the minimum information necessary to register;
- (b) Establishment of a unique identification number for businesses, which would not conflict with global initiatives in this regard;
- (c) Data protection and confidentiality;
- (d) Ability to search for a unique business name;
- (e) Easily-updated information;
- (f) Identification of who would have access to the information, including credit institutions and the public;
- (g) Consider interconnectivity among relevant authorities, including that information need only be provided once by the user;
- (h) Low or no cost;
- (i) Quickly accomplished;
- (j) Minimal and simple procedures to follow;
- (k) A record of the history of the business should be maintained;
- (l) A standard model form should be provided electronically to the user and could possibly be used for the creation of company by-laws;
- (m) Provide the user with the necessary means to conduct business, such as providing a tax identification number; and
- (n) Provide proof of existence of the business.

50. In addition, in respect of anti-money-laundering, anti-terrorism and the prevention of other illicit activity, it was agreed that other international guidelines and recommendations should be taken into account.

### **Capital requirements for incorporation**

51. It was observed that the requirement of minimum capital for incorporation was an issue on which there was not agreement in all quarters. Although it was acknowledged that too high a capital requirement could be considered too harsh, the view was reiterated that minimum capital requirements were necessary and reasonable in order to offset the provision of limited liability to an enterprise and to signal its commitment to the sustainability of the business. It was further noted that even in States where incorporation with no capital requirement was possible, an enterprise nonetheless required assets in order to function. Another view questioned the need for limited liability, observing that a business owner in that State would obtain access to credit most easily by agreeing to unlimited personal liability.

52. However, there was support in the Working Group for the opposite view that the requirement of minimum capitalization of an enterprise was not an appropriate method of protecting third parties dealing with the business, and could both increase costs and unnecessarily keep businesses out of the formal economy. Other means that did not impose significant costs on businesses were suggested as better able to protect creditors, such as the creation of standards of conduct including good faith,

transparency of business information, fiduciary responsibilities and the ability to pierce the corporate veil. One particular problem related to establishing minimum capital requirements was said to be the difficulty of quantifying an appropriate amount, and the rigidity inherent in making such a choice. There was broad agreement with the view that the modern trend was to move away from minimum capital requirements. One delegation quoted World Bank research indicating that minimum capital requirements hindered business development and growth, as well as failing to fulfil the regulatory functions for which they were intended.

53. It was observed that in keeping with the modern trend away from strict minimum capital requirements for incorporation, certain legal regimes had been established that took into account the difficulty of smaller enterprises to meet those requirements early in their life cycle, and had adopted a system of progressive capital requirements. Several States reported having as one of their incorporation models a system whereby an enterprise could incorporate with no or a nominal capital requirement, but that each year it operated, the company was required to set aside a certain percentage of its profit, or a set amount each year, until its reserves reached a certain amount such that it could be said to be, or to amount to, a fully capitalized corporation. Another State reported a variation on the progressive capitalization approach, which adopted a limited liability partnership model that used a similar transitional phase to allow the business to grow over the course of several years until it reached a minimum reserve level, during which time there were restrictions on the distribution of dividends and sharing of profits. Reasons for creating additional flexibility in terms of minimum capital requirements included the fact that in deciding whether to deal with the company, creditors were more likely to focus on the assets of the company than its liabilities, and that forum-shopping was taking place by companies wishing to operate in a State, but not wishing to incorporate in that State and meet its minimum capital requirements.

54. A concern was raised that even progressive capital requirements could negatively impact small enterprises starting up, since the first three years of their life cycle were the most critical, yet the enterprises would be required to progressively build up their reserves during that period in spite of their possible financial fragility. It was reiterated that the Working Group should continue to be mindful of the fact that different sizes of businesses, from micro to small to medium, could require different solutions in terms of the issue of minimum capital requirements.

55. Additional possible alternatives to a minimum or progressive capitalization requirement to protect third parties dealing with such enterprises were also suggested. For example, accounting rules that require certain transparency could be used, as could specific rules relating to the distribution of the profits of the company. Another solution used by a State was to require no minimum capital, but to require public disclosure, possibly by way of a registry, by the business of any decision it took in respect of its capital, including setting aside certain amounts or having variable capital reserves. In addition, it was said that the issue of transparency in accounting and the auditing of financial statements could assist in the protection of third parties, as could the establishment of credit bureaus, be they established by the State or by private interests. Other elements that could be used to protect third parties were said to be the establishment of a supervisory role by company registries; the establishment of specialized agencies to supervise businesses; monitoring corporate governance; setting interest rates; and ensuring that secured transactions and insolvency laws permitted negotiated contractual protections.

56. It was noted that a State with progressive capitalization requirements for one of its types of incorporation provided notice to third parties by requiring such corporations to use a specific suffix in its legal name. Another possible method of protecting third parties that was under consideration by a State was to allow a corporation to have limited liability without capitalization requirements, provided that it was limited to a maximum turnover — an approach that would again differentiate on the basis of the size of the business.

57. Other methods of protecting third parties dealing with companies with minimum or no capitalization was linked to the issues outlined in paragraph 52 above, and were said to have been especially effective in developing States. Rather than establishing *ex ante* requirements which could impose costs on companies, the State could instead intervene *ex post* in order to discipline fraudulent behaviour or irregular use of the company. In addition, it was observed that certain *ex ante* requirements could also be effective in preventing such behaviour from occurring, and that insolvency procedures could also be invoked to assist third parties.

58. The Working Group was reminded that the size of the informal economy in States that were members of the Organization for Economic Cooperation and Development was quite modest in comparison to figures available on the size of the informal economy in developing countries. It was said that bringing actors in the informal economy into the formalized system was therefore mainly a problem in developing countries, and it was suggested that providing a scheme for simplified business incorporation presented one option for enterprises wishing to make the transition into the formalized economy.

59. It was further observed that the Working Group may wish to take note that not all third parties dealing with the enterprise could be protected in the same way. It was noted that high standards of public disclosure in terms of an enterprise's finances might be sufficient to protect voluntary creditors of a company, but that such mechanisms may not sufficiently protect involuntary creditors, nor may minimum capital requirements or obligatory capital reserves. It was suggested that in such cases, States may wish to establish better mechanisms for satisfying the claims of involuntary creditors so as to avoid putting an unnecessary burden on the business.

### **Dispute resolution**

60. It was noted that issues in respect of dispute resolution did not only concern the resolution of disputes among partners or as between partners and managers of the business, but related also to conflicts arising between the business and third parties, such as creditors or clients. In the case of the former, it was noted that conflicts involving business partners and managers were often resolved in courts, which could be problematic in developing States due to a lack of experience in dealing with such matters, expensive court fees and overburdened court dockets. One method of dealing successfully with this problem in both developing and developed countries had been to establish special courts to deal with such disputes.

61. In respect of disputes involving the business and third parties, several delegations highlighted the need for micro and small businesses to have access to fast and inexpensive dispute resolution mechanisms rather than dealing with the formal court system. Experiences were shared by various delegations as to their approach in resolving disputes concerning micro and small businesses and in providing consumer protection. Several examples concerned the establishment of specialized institutions for the resolution of disputes resulting from financial claims. In one case, it was observed that the institution could not render binding decisions, but relied on voluntary compliance by the financial intermediary at fault; cases of non-compliance were publicized, resulting in a strong negative effect on the commercial reputation of the party at fault.

62. It was also suggested that there was a need to address conflict arising between MSMEs and third parties in situations of financial distress of the business. This was said to require a simplified regime of insolvency that would meet the needs of MSMEs, a matter currently being considered in UNCITRAL's Working Group V. One State provided an example of an expedited regime that it had for micro and small business, aimed mainly at encouraging refinancing arrangements. The Working Group agreed on the importance of providing simplified and low-cost dispute resolution procedures to MSMEs, with a particular focus on methods such as arbitration and mediation, including online dispute resolution.



### **Governance issues**

63. The Working Group next considered the issue of the internal governance of enterprises. It was generally agreed that freedom of contract should be the guiding principle in terms of establishing the internal organization of a company, although it was noted that very unsophisticated micro and small businesses could find resort to this principal a challenge in setting up their businesses. Two examples of possible exceptions to absolute freedom of contract in this regard were said to be rules regarding the prevention of conflicts of interest of managers of the company and certain rules relating to the law of agency. It was noted that freedom of contract was a desirable goal, but that micro and small businesses might have difficulty with the transaction costs of establishing their own internal governance and of complying with it, and that standard forms could also be useful in this regard.

64. It was also noted that some forms of business association were quite rigid and required certain information in the articles of association from which there could be no deviation. It was said that such rules were necessary for very practical reasons, for example, to establish how revenues of the company should be distributed. Moreover, very strict rules were also required for some publicly-traded companies in order to prevent instability that could damage the economic system.

### **D. Next steps**

65. The Working Group agreed that it had been able to consider a number of important issues key to developing its work on preparing legal standards on simplified business incorporation and registration, and considered what work would have to be accomplished prior to its next session in order to make progress in fulfilling its mandate. In addition to the document setting out best practices in respect of business registration which the Secretariat had been requested to prepare for the next session of the Working Group (see paragraph 49 above), a second document was to be prepared in advance of that session by States outlining their experience in respect of alternative approaches to the challenges of simplified incorporation and supporting MSMEs (see paragraph 46 above). In addition to those materials, the Secretariat was requested to prepare a template on simplified incorporation and registration containing contextual elements and experiences linked to the mandate of the Working Group, to provide the basis for drafting a possible model law, without discarding the possibility of the Working Group drafting different legal instruments, particularly, but not exclusively, as they applied to MSMEs in developing countries. This template could include provisions on limited liability, legal personality, registration and proof of existence of companies, incorporation procedures, capital requirements or alternatives thereto, accounting and transparency, and liability of those who represent the company.

### **V. Possible future work**

66. The Working Group acknowledged and welcomed the Commission's mandate relative to the establishment of an enabling legal environment to facilitate the life cycle of MSMEs, beginning with the implementation of simplified rules of registration, incorporation and operation of such enterprises, in addition to other topics such as financial inclusion, including mobile payments, access to credit, alternative dispute resolution and simplified insolvency rules.

## B. Note by Secretariat on selected activities of international and intergovernmental organizations to promote micro, small and medium-sized enterprises

(A/CN.9/WG.I/WP.81)

[Original: English]

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### I. Background

1. At its forty-sixth session, in 2013, the Commission agreed that work on international trade law aimed at reducing the legal obstacles faced by micro, small and medium-sized enterprises (MSMEs) throughout their life cycle and, in particular, those in developing economies should be added to the work programme of the Commission.

2. The Commission also agreed that such work should start with a focus on the legal questions surrounding simplified incorporation and that the Secretariat should prepare documentation in order to assist the Working Group. This preparatory documentation should include, *inter alia*, information on how the work of the Commission in the area of MSMEs is complementary to the work of other international and intergovernmental organizations — both within and outside the United Nations — having a mandate in these fields.

3. This note has been prepared to provide that information on international initiatives in response to the request of the Commission. It integrates the findings of the UNCITRAL colloquia organized in 2011 and 2013<sup>1</sup> as well as those of Secretariat notes submitted to the Commission at its forty-third (2010),<sup>2</sup> and forty-fifth (2012)<sup>3</sup> sessions.

### II. The broader United Nations context

4. The upcoming work on MSMEs can be placed in the context of sustainable development and inclusive finance. The mandate of Working Group I appears to be consistent with the emphasis of the outcome document of the United Nations Conference on Sustainable Development, entitled “The future we want”, on poverty eradication, gender equality, sustainable economic development, and the advancement of social stability and just distribution. The vision and the political commitment expressed in that document, which was endorsed by the United Nations General Assembly,<sup>4</sup> contribute to the preparation of the Post-2015 Development

<sup>1</sup> See A/CN.9/727 and A/CN.9/780 respectively. Presentations delivered at those colloquia are available on the UNCITRAL website at [www.uncitral.org/uncitral/en/commission/colloquia/microfinance-2011.html](http://www.uncitral.org/uncitral/en/commission/colloquia/microfinance-2011.html) and [www.uncitral.org/uncitral/en/commission/colloquia/microfinance-2013.html](http://www.uncitral.org/uncitral/en/commission/colloquia/microfinance-2013.html).

<sup>2</sup> See A/CN.9/698.

<sup>3</sup> See A/CN.9/756.

<sup>4</sup> See Resolution A/RES/66/288, The future we want, adopted in July 2012. The United Nations

Agenda. Under the current United Nations-wide efforts<sup>5</sup> to set the Agenda, global policymakers are examining, inter alia, the role that the promotion of microfinance and inclusive financing, financial cooperatives, business cooperatives, and other means such as the more effective use of diaspora remittances, and various public-private partnership structures can play in supporting inclusive development.

5. As a contribution to this discussion, the recent Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda<sup>6</sup> has clearly indicated that business wants a simple regulatory framework which makes it easy to start, operate and close a business. This is particularly true for small and medium-sized enterprises (SMEs) which are “especially hamstrung by unnecessarily complicated regulations that can also breed corruption”.<sup>7</sup> Reform that introduces smart regulation that is stable and implemented in a transparent way is thus required. It may be noted that in the context of universal legal identity, the Report emphasizes the key importance of legal registration, currently denied to billions of natural persons, in order to prevent deprivation of economic and civil rights. This suggests a similar consideration with regard to the mandate of Working Group I, which addresses the lack of formal legal personality among numerous MSMEs that constrains their ability to fully benefit from social and economic developments and also detracts from the ability of the States to implement appropriate transparency and other measures.

6. The rule of law is integrated in the global efforts to promote sustainable development, and that connection is formally recognized in the Rule of Law Declaration of the United Nations General Assembly.<sup>8</sup> This Declaration and the Special High-Level Event<sup>9</sup> of the General Assembly on the follow-up to the Millennium Development Goals have confirmed the rule of law’s importance in the preparation of the Post-2015 Development Agenda. Discussions at the 2013 UNCITRAL colloquium and at the forty-sixth session of the Commission, in 2013, highlighted how UNCITRAL work, on developing a simplified legal model for MSMEs and creating an enabling legal environment for those businesses, can contribute to reinforcing the rule of law at the country level.<sup>10</sup> In light of the preparatory discussions for the Post-2015 Development Agenda, it may now be

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Conference on Sustainable Development, also known as Rio+20 Conference, took place in Brazil on 20-22 June 2012 to mark the 20th anniversary of the 1992 United Nations Conference on Environment and Development (UNCED), in Rio de Janeiro, and the 10th anniversary of the 2002 World Summit on Sustainable Development (WSSD) in Johannesburg. For more information see: [www.uncsd2012.org/about](http://www.uncsd2012.org/about).

<sup>5</sup> The United Nations Secretary General, among other initiatives, has established the United Nations System Task Team on the Post-2015 United Nations Development Agenda to support system-wide preparations for the Agenda. The Team brings together more than 60 United Nations agencies and international organizations. In its first report to the Secretary General, the Team suggested four key dimensions on which to articulate the Agenda: (1) inclusive social development; (2) inclusive economic development; (3) environmental sustainability; and (4) peace and security. For more information see [www.un.org/en/development/desa/policy/untaskteam\\_undf/index.shtml](http://www.un.org/en/development/desa/policy/untaskteam_undf/index.shtml).

<sup>6</sup> The Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda, A New Global Partnership: Eradicating Poverty and Transform Economies Through Sustainable Development, 2013, available at [www.un.org/sg/management/pdf/HLP\\_P2015\\_Report.pdf](http://www.un.org/sg/management/pdf/HLP_P2015_Report.pdf). The Panel was established in 2012 by the United Nations Secretary-General to make recommendations to the Secretary-General on the development agenda beyond 2015.

<sup>7</sup> *Ibid.*, page 9.

<sup>8</sup> See Paragraphs 7 and 8 General Assembly resolution A/RES/67/1.

<sup>9</sup> The Millennium Development Goals follow-up Special High-Level Event of the General Assembly took place on 25 September 2013. The outcome of this event is documented and confirmed as General Assembly resolution A/RES/68/6. See paras. 13 and 19 of the resolution for the interconnection of the rule of law and sustainable development in the Post-2015 Agenda. Especially para. 19 final three sentences, which state: “Recognizing the intrinsic interlinkage between poverty eradication and the promotion of sustainable development, we underline the need for a coherent approach that integrates in a balanced manner the three dimensions of sustainable development. This coherent approach involves working towards a single framework and set of goals, universal in nature and applicable to all countries, while taking account of differing national circumstances and respecting national policies and priorities. It should also promote peace and security, democratic governance, the rule of law, gender equality and human rights for all.”

<sup>10</sup> See A/CN.9/780 para.13 and *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 319.

expected that the results of such work, along with UNCITRAL's contribution generally, might also become a core component of future United Nations-wide projects to implement the Agenda.

### III. Micro, small and medium-sized enterprises: some facts and figures

7. The Global Partnership for Financial Inclusion (GPFI),<sup>11</sup> citing a study done by the International Finance Corporation (IFC), reports that there is an estimated "total MSME population worldwide of 420 to 510 million, of which 360 to 440 million are in emerging markets. Of these, there are 36 to 44 million formal SMEs globally (about 9 per cent of the total MSME population), of which 25 to 30 million are in emerging markets".<sup>12</sup> In addition, SMEs (formal and informal) account for 72 per cent of total employment and 64 per cent of Gross Domestic Product (GDP) in developed economies, and 47 per cent of employment and 63 per cent of GDP in low-income countries. Informal SMEs provide 48 per cent of all jobs in emerging market countries, and 25 per cent of all jobs in developed countries, but account for only 37 per cent and 16 per cent of GDP in these markets, respectively.<sup>13</sup>

8. In the European Union (EU), 99 per cent of all businesses are SMEs, which provide two out of three private sector jobs and contribute to more than half of total value-added created by business in the EU. The EU further states that "nine out of ten SMEs are actually microenterprises with less than 10 employees. Hence, the mainstays of Europe's economy are micro firms, each providing work for two persons in average".<sup>14</sup> Similar to the EU, SMEs represent 99 per cent of all enterprises in the region of the Association of Southeast Asian Nations (ASEAN), contributing from 30 to 60 per cent of the GDP.<sup>15</sup> In the Asia-Pacific Economic Cooperation (APEC) region, SMEs account for around 90 per cent of all businesses and employ as much as 60 per cent of the work force.<sup>16</sup> In the Caribbean Community and Common Market (CARICOM), MSMEs provide more than 50 per cent of GDP and account for 70 per cent of the jobs<sup>17</sup> and in Latin America, over 18.5 million MSMEs provide employment to about 70 per cent of the regional workforce and contribute almost 50 per cent of the region's GDP.<sup>18</sup> In Africa, according to the African Development Bank (AfDB), SMEs contribute more than 45 per cent to employment and 33 per cent to GDP.<sup>19</sup>

9. Despite this major role played by MSMEs in economic development across regions, several factors, in particular in developing and emerging markets, still

<sup>11</sup> GPFI is the main implementing mechanism of the Financial Inclusion Action Plan endorsed by the Group of 20 (G-20) leaders at the Seoul summit (10 December 2010, Seoul). The Action Plan identifies six areas to advance financial inclusion for individuals, households and MSMEs and to promote the application of the G-20 Principles for Innovative Financial Inclusion.

See [www.gpfi.org/](http://www.gpfi.org/).

<sup>12</sup> GPFI, IFC, Small and medium enterprise finance: new findings, trends and G-20 global partnership for financial inclusion progress, 2013, page 12, available at [www.ifc.org/wps/wcm/connect/16bca60040fa5161b6e3ff25d54dfab3/SME+Finance+report+8\\_29.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/16bca60040fa5161b6e3ff25d54dfab3/SME+Finance+report+8_29.pdf?MOD=AJPERES).

<sup>13</sup> IFC Jobs Study: Assessing Private Sector Contributions to Job Creation and Poverty Reduction, 2013, pp. 10-11.

<sup>14</sup> See European Commission, Enterprise and Industry at: <http://ec.europa/enterprise/policies/facts-figures-analysis>.

<sup>15</sup> P. Manawanitkul, Enabling Environment for Microbusiness — ASEAN Experience, Presentation delivered at the International Joint Conference on "Enabling Environment for Microbusiness and Creative Economy, organized by UNCITRAL, the Ministry of Justice Republic of Korea and the Korean Legislation Research Institute, Seoul, 14-15 October 2013.

<sup>16</sup> See [www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/Small-and-Medium-Enterprises.aspx](http://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/Small-and-Medium-Enterprises.aspx).

<sup>17</sup> See [www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=E-061/12](http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-061/12).

<sup>18</sup> Available at [www.informeavina2008.org/english/develop\\_case2\\_SP.shtml](http://www.informeavina2008.org/english/develop_case2_SP.shtml).

<sup>19</sup> See the African Development Group News and Events page, The AfDB SME Program Approval: Boosting Inclusive Growth in Africa, 2013, available at [www.afdb.org/en/news-and-events/article/the-afdb-sme-program-approval-boosting-inclusive-growth-in-africa-12135/](http://www.afdb.org/en/news-and-events/article/the-afdb-sme-program-approval-boosting-inclusive-growth-in-africa-12135/).

interfere with their performance and capacity to grow. Constraints for MSMEs are faced throughout the legal, regulatory, financial and cultural environments. These areas are thus the target of most of the initiatives of international organizations aiming at the creation of an enabling environment for MSMEs.

10. According to the World Bank Enterprise Surveys, SMEs worldwide consider lack of access to finance one of their greatest obstacles to growth (roughly 18 per cent of MSMEs in low income countries have access to formal financial services).<sup>20</sup> Over 36 per cent of SMEs have indicated that excessive regulation is another major burden, especially in developing countries: SMEs often lack the capacity of larger firms to navigate through the complexities of regulatory and bureaucratic procedures.<sup>21</sup> Similarly, the International Labour Organization (ILO) stresses burdensome registration procedures (time and cost) and ability to comply with laws and regulations in several areas among the challenges affecting the performance of MSMEs.<sup>22</sup> The IFC notes that “countries with lower entry costs and lower costs of registering property have a larger SMEs sector in manufacturing”.<sup>23</sup> Tax rates and corruption are also perceived by SMEs in developing countries and low income countries as major obstacles to growth. In addition to these elements, recent research suggests that minimum capital and comparable minimum size requirements are also relevant obstacles. Although such requirements may serve public policy purposes, they effectively exclude small or occasional suppliers from the markets concerned.<sup>24</sup> All of these factors represent some of the most often cited reasons for which MSMEs fail to move into the formal economy.

11. Women entrepreneurs warrant additional consideration as they are over-represented in the informal economy.<sup>25</sup> Women control less than 40 per cent of formal microenterprises, less than 36 per cent of small firms, and less than 21 per cent of medium-sized firms.<sup>26</sup> In many regions, women entrepreneurs experience “disproportionately higher barriers relative to their male counterparts”.<sup>27</sup> These barriers are both financial and non-financial, and considerably limit the growth of women-owned MSMEs. They may range from low access to finance (e.g. women are less likely to take out a loan, or the terms of borrowing can be less favourable for them) and the legal and regulatory environment (e.g. weak property rights or legal capacity); to education gap (e.g. low access to higher education, low financial literacy) and barriers related to social norms (e.g. restrictions on mobility or on engagement with people outside the home or on activities women can engage in). Recent studies show that average growth rates of women-run firms are significantly higher than for male-owned firms and suggests that formalization can considerably improve the performance of women-owned MSMEs.<sup>28</sup> Experience in developed economies seems to confirm this consideration. For example, in the United States women-owned businesses grow at more than double the rate of all other businesses and, according to data projections, they will be primarily responsible for future job

<sup>20</sup> K. Kushnir, M. L. Mirmulstein and R. Ramalho, *Micro, small and medium enterprises around the world: How many are there, and what affects their count?*, 2010, World Bank/IFC, page 5 ff.

<sup>21</sup> IFC, *Scaling-up SME access to financial services in the developing world*, 2010, page 15. This report was prepared under the leadership of IFC as lead technical advisor of the G-20 Financial Inclusion Experts Group’s (FIEG) SME Finance Sub-Group. The Global Partnership for Financial Inclusion (GPII) has institutionalized and continued the work began by FIEG.

<sup>22</sup> See ILO, *The promotion of sustainable enterprises*, 2007, page 90.

<sup>23</sup> *Supra*, note 21, page 15.

<sup>24</sup> See R. Adlung, M. Soprana, World Trade Organization, *Staff Working Paper, SMEs in Services Trade — A GATS Perspective*, 2012, page 14.

<sup>25</sup> Donor Committee for Enterprise Development (DCED), *Supporting Business Environment Reforms: Practical Guidance for Development Agencies*, Annex: *How Business Environment Reform Can Promote Formalisation*, 2011, page 2.

<sup>26</sup> GPII, IFC, *Strengthening Access to Finance for Women-Owned SMEs in Developing Countries*, 2011, page 6.

<sup>27</sup> *Supra*, note 12, page 12.

<sup>28</sup> The studies were carried out in Indonesia, Malaysia, Thailand, and Viet Nam. *Supra*, note 12, page 14 citing MasterCard Worldwide 2010.

growth in the country. It is expected that by 2018, women entrepreneurs in the United States of America will create between 5 million and 5.5 million new jobs.<sup>29</sup>

## IV. Initiatives of international and intergovernmental organizations

### A. Regional organizations and regional economic organizations

12. Regional organizations and regional economic organizations support MSMEs in various ways. However, policy development and the provision of technical assistance seem to prevail over the drafting of comprehensive legislation addressing the needs and requirements of MSMEs.

13. Among the various organizations reviewed by the Secretariat, only the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) appears to be working towards such a legislative framework. In 2010, OHADA adopted the reform of the Uniform Act relating to General Commercial Law (Acte uniforme sur le droit commercial general) and established a partly simplified regime for small business managed by an individual entrepreneur (the "entreprenant"). Formalization of the "entreprenant" business only requires the submission of a declaration to the Trade and Personal Property Credit Register (Registre du commerce et du crédit mobilier) and the business accounting obligations are simplified. Simplified rules relating to microenterprises are also included in Article 13 of the Uniform Act Organizing and Harmonizing Undertakings' Accounting Systems in the Signatory States to the Treaty on the Harmonization of Business Law in Africa (Acte uniforme portant organisation et harmonisation des comptabilités des entreprises). Further, in 2010, OHADA adopted uniform legislation governing the establishment and operation of cooperatives (Acte uniforme relative au droit des sociétés cooperatives), which has specific provisions for simplified forms of cooperatives ("sociétés cooperatives simplifiées"). Finally, OHADA is currently revising the Uniform Act Relating to Commercial Companies and Economic Interest Groups (Acte uniforme relatif au droit des Sociétés Commerciales et du Groupement d'Intérêt Economique), which sets out different rules establishing and governing multiple corporate entities. The travaux préparatoires of the revised Act suggest reducing the minimal capital requirement and limiting the role of the notary in establishing a company as well as developing new company forms.<sup>30</sup> Although the legislative framework is a work in progress, it has been noted that the laws developed, and being developed, in OHADA make it easier to set up a company that is recognized in all of the OHADA States, than is the case in other regional organizations.<sup>31</sup>

14. The EU has worked extensively to find an appropriate definition for European MSMEs,<sup>32</sup> and identify the proper size requirements for a firm to be labelled as such. In 2008, it adopted the "Small Business Act" which establishes a comprehensive SME policy framework for its Member States. The Act is a set of ten principles to guide the conception and implementation of policies, both at EU and Member State level, in order to create a level playing field for SMEs throughout the EU and to improve the administrative and legal environment so as to allow these enterprises to unleash their full potential to create jobs and growth.<sup>33</sup> To monitor and assess Member States'

<sup>29</sup> *Supra*, note 26, page 12.

<sup>30</sup> See World Bank, *Doing Business dans les États membres de l'OHADA 2012*, page 3. According to the OHADA website, the Act should be submitted to the Council of Ministers at its next session in December 2013 for adoption: [www.ohada.com/actualite/1946/reunion-speciale-du-comite-des-experts-des-etats-membres-de-l-ohada-dakar-19-24-aout-2013.html](http://www.ohada.com/actualite/1946/reunion-speciale-du-comite-des-experts-des-etats-membres-de-l-ohada-dakar-19-24-aout-2013.html).

<sup>31</sup> L. Boy, *Les limites du formalisme du droit de l'OHADA à la sécurisation des entreprises*, *Revue de l'ERSUMA* 1, 1 (2012), page 2.

<sup>32</sup> See Article 2 Annex to Recommendation 2003/361/CE according to which MSMEs are those enterprises with less than 250 people and with an annual turnover under 50 million euros or with an annual balance sheet which does not exceed 43 million euros.

<sup>33</sup> See European Commission, *Enterprise and Industry, Small Business Act for Europe* at <http://ec.europa.eu/enterprise/policies/sme/small-business-act/>.

performance in implementing the Act, the SME Performance Review has been developed. In 2011, in response to the economic crisis, the EU Commission announced that it would seek wherever possible to exempt microenterprises from EU legislation or introduce special regimes so as to minimize the regulatory burden on them. The Commission also announced its intention to ensure that input from MSMEs is included in the formulation of new EU initiatives.<sup>34</sup> In mid-2013, the Commission launched an EU-wide consultation on single member liability companies to obtain information on whether the harmonization of national laws in this regard would provide companies, and in particular SMEs, with simple and harmonized rules across the EU which could reduce the administrative burden and costs they are currently facing. The responses to the consultation will be instrumental in assessing the need for, and impact of, a possible new instrument.<sup>35</sup>

15. Like the EU, ASEAN strives to promote MSME-friendly policies. ASEAN has adopted a Policy Blueprint for SME Development (2004-2014), which provides the framework to accelerate SMEs development in the region. The Blueprint, *inter alia*, supports simplification of MSME registration procedures and the fine-tuning of policy and regulatory frameworks. A Strategic Action Plan (2010-2015), building on the Blueprint, further strengthens the establishment of MSMEs and their operation in ASEAN. Regional programmes, mechanisms promoting access to information, databases and the dissemination of best practices (for instance, by hyperlinking all the SME portals within the region) have been devised for this purpose. The Strategic Action Plan also covers the work of the ASEAN SME Working Group (ASEAN SMEWG), which seeks to ensure the advancement of SMEs in the region.

16. The APEC Ease of Doing Business initiative, launched in 2009, aims to achieve an improvement of 25 per cent by 2015 in respect of targets established in five key areas of doing business, one of which is starting a business. The focus of this category is on the number of procedures required to start a business, the time and the cost it takes as well as the paid-in minimum capital requirement. In the period 2009-2012, APEC has made the biggest improvements in the category of starting a business. The Ease of Doing Business initiative includes capacity-building programmes in order to assist APEC member economies in their efforts. Such programmes are articulated in seminars and workshops as well as customized technical advice.<sup>36</sup>

17. The Common Market for Eastern and Southern Africa (COMESA) has recently adopted a draft Regional Policy Strategy for MSME development (August 2013)<sup>37</sup> to increase the prevalence of SMEs in the region. Some of the areas addressed are: promoting an enabling environment for SME operations and SME related infrastructure development, and promoting SME technological and production capacity. The solutions discussed have included the creation of an SME fund at the regional and country levels and the allocation of a minimum percentage of all public procurements in Member States to SMEs. COMESA has also developed a Simplified Trade Regime<sup>38</sup> of which SMEs are encouraged to take advantage when trading across borders in the region. As to technical assistance, information available to the Secretariat suggests that COMESA supports the SME toolkit project (in conjunction

<sup>34</sup> See [http://europa.eu/rapid/press-release\\_IP-11-1386\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-11-1386_en.htm?locale=en).

<sup>35</sup> See [http://ec.europa.eu/internal\\_market/consultations/2013/single-member-private-companies/](http://ec.europa.eu/internal_market/consultations/2013/single-member-private-companies/). The Consultation, directed at national authorities, companies, notaries, lawyers, universities and business organizations, closed in September 2013. In addition, the recent EU Commission communication on Regulatory Fitness and Performance (REFIT): Results and Next Steps includes the suggestion of withdrawing the current proposal of a European private company (SPE), since the Commission is considering presenting a new one. See COM(2013) 685 final at [http://ec.europa.eu/commission\\_2010-2014/president/news/archives/2013/10/pdf/20131002-refit\\_en.pdf](http://ec.europa.eu/commission_2010-2014/president/news/archives/2013/10/pdf/20131002-refit_en.pdf).

<sup>36</sup> APEC's Ease of Doing Business — Interim Assessment 2009-2012, 2013/SOM3/EC/006.

<sup>37</sup> See e-COMESA Newsletter, Issue 387, 31 August 2013, available at [www.comesa.int/attachments/article/865/comesa%20newsletter\\_387.pdf](http://www.comesa.int/attachments/article/865/comesa%20newsletter_387.pdf).

<sup>38</sup> The Simplified Trade Regime aims at simplifying the whole process of clearing goods, which have been grown or wholly produced in the COMESA Region, for small and medium size traders by way of introducing a simplified certificate of origin, a simplified Customs document and a common list of qualifying goods. For more information see [www.cbtcomesa.com/str.php](http://www.cbtcomesa.com/str.php).

with the World Bank Group and other partners) that aims to promote small business growth and to provide a number of “how to” guides for such enterprises in Zambia.

18. In the Southern Africa Development Community (SADC), the Protocol on Finance and Investment addresses the role of MSMEs in economic cooperation. In 2012, SADC adopted the Industrial Development Policy Framework. Information available to the Secretariat indicates that the Framework recognizes SMEs as the backbone of most SADC economies and suggests that enhancing support to small and medium-sized enterprises is one of the key areas of intervention. The Framework goes on to stress the importance of a regional approach to SME development in order to facilitate, *inter alia*, their access to market and industrial information and their participation in export promotion initiatives. Some of the specific actions indicated to reach these goals include: developing a portal for SMEs and organizing a series of buyer-sellers meetings to promote linkages between SMEs and large enterprises.

19. In the African Union’s New Partnership for Africa’s Development (NEPAD)<sup>39</sup> Framework document, African leaders pledge to eradicate poverty in their countries: some of the goals voiced in the pledge are aimed at increasing the availability of resources available to SMEs.<sup>40</sup> This is consistent with the African Union’s Treaty Establishing the Economic Community (1991)<sup>41</sup> which states that industrial development will be achieved partially by “ensuring the promotion of small-scale industries with a view to enhancing the generation of employment opportunities in Member States”.

20. The Organization of American States (OAS) seems to be more focused on the provision of technical assistance to MSMEs, in particular in selected areas such as promoting entrepreneurship and competitiveness.<sup>42</sup> For instance, in 2012, in partnership with the Government of the United States and other institutional partners, the OAS launched a project to establish small business development centres in five CARICOM Member States.<sup>43</sup> The project aims to contribute to the development of MSME support institutions which provide long-term business counselling and training to new businesses. OAS also supports the High-Level Dialogue of Authorities Responsible for Trade and for MSMEs, a forum for policy dialogue among high-level authorities of Member States for the exchange of best practices and lessons learned to further the adoption of public policies that promote the competitive capacity of MSMEs and their participation in international trade opportunities. Other initiatives focus on promoting the internationalization of MSMEs with an emphasis on those owned by women and vulnerable groups. The Central American Women Business Network Project is one of such initiatives. It facilitates the transfer of experience and knowledge from successful entrepreneurs to MSMEs with potential to participate in value chains and helps to connect women-led SMEs with large scale purchasers of products. In addition, the OAS supports training programmes for small businesses, including online courses, as well workshops on SME addressing small business entrepreneurs and government officials.

21. The Arab League is committed to providing financial support to MSMEs through a Special Account created after the first Arab Economic and Social Development Summit (Kuwait, January 2009), and managed by the Arab Fund for Economic and Social Development. The Account provides financing to intermediate institutions, which will then disburse funds to SMEs in their respective countries. As

<sup>39</sup> NEPAD is the African Union’s socioeconomic framework for development; it was established in 2001.

<sup>40</sup> See The New Partnership for Africa’s Development (NEPAD), 2001, available at [www.nepad.org/system/files/NEPADFramework\\_\(English\).pdf](http://www.nepad.org/system/files/NEPADFramework_(English).pdf).

<sup>41</sup> The Treaty seeks to create the African Economic Community through six stages culminating in an African Common Market using the Regional Economic Communities (RECs) as building blocks. The Treaty has been in operation since 1994. See [www.au.int/en/about/nutshell](http://www.au.int/en/about/nutshell).

<sup>42</sup> See however *infra*, note 101.

<sup>43</sup> The five States targeted by the project are: Barbados, Belize, Dominica, Jamaica and St. Lucia. See, for instance, [www.carib-export.com/2013/03/small-business-development-centres-to-open-across-the-region/](http://www.carib-export.com/2013/03/small-business-development-centres-to-open-across-the-region/) and [www.state.gov/r/pa/prs/ps/2012/02/184639.htm](http://www.state.gov/r/pa/prs/ps/2012/02/184639.htm).



of April 2013, 16 Arab States were participating in the Account (in addition to the Arab Fund).<sup>44</sup>

22. Financial support to small businesses is also the purpose of the SME Facility, established under the Eastern Partnership between the EU and selected Eastern European countries. The Facility combines allocations from financial institutions such as the European Investment Bank (EIB), the European Bank for Reconstruction and Development (EBRD) and the Reconstruction Credit Institute to financial intermediaries for on-lending to MSMEs. The Facility also provides technical assistance to the enterprises (thanks to an EU grant) and, building on the “*acquis communautaire*” on SME development (such as the Small Business Act), aims to support the partner countries in their legislative and policy reforms in the area of MSMEs.<sup>45</sup>

## **B. International organizations and intergovernmental organizations**

### **1. Introduction**

23. In recent years, due to the structural adjustments required by the changing economic environment and the consequences of the world economic crisis, international organizations have joined national governments in recognizing the importance of MSMEs. This recognition has focused on the key role of such enterprises in poverty reduction, the creation of employment and in enhancing the welfare of several segments of the population, including those most vulnerable, such as women and youth, as well as those living in developing countries.

24. In 2012, for instance, two United Nations General Assembly resolutions called upon Governments and international organizations to support the development of MSMEs: resolution 66/288, endorsing the outcome document of the United Nations Conference on Sustainable Development (see paragraph 4 above)<sup>46</sup> and resolution 67/202, focusing on the contribution of entrepreneurship to sustainable development. This latter resolution calls for the creation of an enabling environment for entrepreneurs, including MSMEs, by addressing the legal, social and regulatory barriers that prevent “equal and effective economic participation”.

25. Furthermore, the 2012 International Year of Cooperatives, celebrated under the coordination of the United Nations Department of Economic and Social Development, stressed the contribution of cooperatives to economic development and poverty eradication. Not only do cooperatives improve market competitiveness, stabilize the economy (especially in sectors like agriculture, where prices are more volatile), and contribute to a fairer distribution of income,<sup>47</sup> but they also represent an enterprise model in those areas where the public sector is not able to meet the needs of the population.<sup>48</sup> In India, for instance, where 94 per cent of those working in the informal sector are women, the Self-Employed Women’s Association offers capacity-building, marketing and business development services, consulting, research and publication services.<sup>49</sup> Moreover, as legally-constituted organizations which enjoy

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<sup>44</sup> The following participate in the Account: Algeria, Bahrain, Egypt, Djibouti, Libya, Kuwait, Jordan, Mauritania, Morocco, Oman, Palestine, Saudi Arabia, Sudan, Syrian Arab Republic, Tunisia and Yemen.

<sup>45</sup> The Eastern Partnership, launched in 2009, includes the following countries: Armenia, Azerbaijan, Belarus, Georgia, Republic of Moldova, Ukraine. Information on establishment of the Partnership can be found at [http://ec.europa.eu/world/enp/docs/2012\\_enp\\_pack/e\\_pship\\_roadmap\\_en.pdf](http://ec.europa.eu/world/enp/docs/2012_enp_pack/e_pship_roadmap_en.pdf). Information on the SME Facility can be found at [www.easternpartnership.org/content/eastern-partnership-funds](http://www.easternpartnership.org/content/eastern-partnership-funds) and at [www.enpi-info.eu/maineast.php?id=547&id\\_type=10](http://www.enpi-info.eu/maineast.php?id=547&id_type=10).

<sup>46</sup> See *Supra*, note 4.

<sup>47</sup> See A/68/168, para. 16.

<sup>48</sup> For instance, the fact that 70 per cent of the hungry live in rural areas has empowered agricultural cooperatives with a crucial role in improving food security (see A/68/168 para. 17); or the critical gaps of the economic recession have been filled by social cooperatives providing welfare activities but also facilitating professional integration of the poor and the disadvantaged (see A/68/168 paras. 5 and 17).

<sup>49</sup> See A/68/168, para. 25.

legal recognition and protection, cooperatives can represent an option for the formalization of informal MSMEs.<sup>50</sup> In his report to the United Nations General Assembly on the observance of the International Year of Cooperatives, the United Nations Secretary-General suggested, among others, that the General Assembly may wish to invite Governments and international organizations, in partnership with cooperatives, to “identify strategies for the creation of a supportive environment by establishing or improving national legislative frameworks in support of cooperative growth”.<sup>51</sup>

## 2. Formalization of MSMEs

26. Informality of MSMEs is thought by many of the international organizations promoting entrepreneurship to be a crucial issue for a country’s economic growth. As the Organization for Economic Cooperation and Development (OECD) has noted, “bringing more enterprises into the formal economy over the long term” should, *inter alia*, provide more sustainable jobs, increase investment, broaden the tax base (and permit lower tax rates), facilitate deal-making, improve access to business services and productive resources such as capital and land.<sup>52</sup> However, initiatives and projects of international organizations do not seem to focus on assisting the development of new legislative models that would facilitate the establishment and operation of MSMEs in the formal economy.<sup>53</sup> Attention seems to concentrate mainly on reducing the existing barriers that represent a constraint on MSMEs on the assumption that this would promote their formalization in the medium and long term.<sup>54</sup> These barriers include regulatory, economic and administrative burdens; fees and financial requirements; corruption, sociocultural factors and poor business services.<sup>55</sup>

27. For instance, in 2008-2012 the ILO carried out an action research programme, with India<sup>56</sup> and Burkina Faso,<sup>57</sup> to assess the extent to which increased access to finance through the provision of financial and non-financial services, could be a catalyst for formalization. The findings, although limited to the activities of the two microfinance institutions that collaborated with the ILO, confirmed that although reaping the fruits of formalization takes time,<sup>58</sup> access to benefits such as government social security schemes and/or bank services is a major motivation for small businesses to join the formal economy. The study also found that formalization is instrumental to improved business practices and that training and raising awareness activities can be conducive to changing the attitude of small business towards it.

28. Better understanding of the factors that drive and prevent informal businesses from formalizing also shapes some of the World Bank initiatives. Registration and tax incentives are one subcategory treated by the Bank, as is the availability of banking and financing at multiple levels. Incorporation is often described as a “decision”; it thus frames the issue of informal economies as a choice rather than a sign of inadequate development, weighing

<sup>50</sup> S. Mshiu, *The Cooperative Enterprise as a Practical Option for the Formalization of Informal Economy*, 2010, available at [www.businessenvironment.org/dyn/be/docs/200/2.2.2\\_Cooperative\\_Practical\\_Option\\_Informal\\_Econ.pdf](http://www.businessenvironment.org/dyn/be/docs/200/2.2.2_Cooperative_Practical_Option_Informal_Econ.pdf).

<sup>51</sup> A/68/168 para. 80 (a).

<sup>52</sup> OECD, *Removing Barriers to Formalisation*, in *OECD Promoting Pro-Poor Growth: Policy Guidance for Donors*, 2007, page 76, available at <http://dx.doi.org/10.1787/9789264024786-en>.

<sup>53</sup> The experience of the American Bar Association (ABA), a national organization in the United States, can be mentioned as an exception. ABA “participates” in LLC reform projects by publishing a Prototype LLC Act. The Prototype Act provides guidance for the analysis and resolution of issues surrounding the drafting of LLC legislation. Even though there are high costs associated with such participation, Bar Association members tend to place a high value on this service, partly because of the reputational benefits associated with the creation of new laws.

<sup>54</sup> *Supra*, note 52, page 77.

<sup>55</sup> *Ibid.*, pages 75 ff.

<sup>56</sup> ILO and Mannheim University, *Microfinance for Decent Work — Microfinance and Formalisation of Enterprises in the Informal Sector: Awareness raising campaign and BDS for the formalisation and strengthening of growth-oriented enterprises*, 2012.

<sup>57</sup> ILO, Université de Mannheim, *La Microfinance et le travail décent, La formalisation des entreprises de l’informel: Une étude d’impact sur la Formation et Sensibilisation à la formalisation des entreprises du secteur informel — RCPB au Burkina Faso*, 2012.

<sup>58</sup> ILO and Mannheim University, *Supra* note 56, pp. 45-46.

other factors such as tax incentives as variables in the push to formalize. Other macroeconomic factors, such as corruption or the general business environment are thought to be weighed heavily by SMEs in making these decisions. For instance, a field experiment conducted in Sri Lanka in 2012 suggested that most of firms were “rationally refraining from formalizing”<sup>59</sup> as they did not see enough benefits. However, the results also suggested that “a relatively modest increase in the net benefits to firms could dramatically increase the rate of formalization”.<sup>60</sup>

29. The Donor Committee for Enterprise Development (DCDE)<sup>61</sup> is the forum of donors and United Nations agencies that supports the growth of the private sector in developing countries. Building on the practical experience of its members<sup>62</sup> as well as research, DCDE shares knowledge and develops guidance on good practices in various areas of private sector development. In its recommendations to donor and development agencies on how they can influence reforms on formalization, the DCDE also highlights the importance of introducing measures that enhance the benefits of formalization.<sup>63</sup>

### 3. Economic barriers: facilitating access to finance

30. Several projects and initiatives of international and intergovernmental organizations aim at improving access to finance for MSMEs. GPMI has launched several collaborative platforms, geared to both formal and informal SMEs, to “provide new ways to combine resources to promote SME finance and development”. In collaboration with the G-20, it has also promoted policy support initiatives such as the G-20 Peer Learning Program, through which countries support each other in promoting greater SME access to finance.<sup>64</sup> The SME Finance Forum, opened in April 2012 and led by IFC, operates a web platform containing links to key documentation from GPMI and other institutions, and sponsors knowledge-sharing. In April 2013, GPMI also launched the Women’s Finance Hub. The SME Finance Initiative started as a collaborative financing and capacity-building platform for institution-level support,<sup>65</sup> with IFC, the UK Department for International Development (DFID) and EIB, and will support risk sharing and other blended finance instruments to encourage the growth of scalable, sustainable financial services to the sector.<sup>66</sup> Formalization of MSMEs, though, is not an immediate goal in any of these initiatives.

31. In addition to providing leadership to some of the GPMI initiatives, IFC supports<sup>67</sup> legislative reform to boost MSMEs’ access to finance in several regions; its main focus is on leasing, secured transactions and credit bureaux. In the area of secured lending, for instance, IFC advises on improvements to the relevant laws, often inspired by the UNCITRAL texts on Security Interests,<sup>68</sup> and the establishment of modern systems of collateral registries.<sup>69</sup> In China, reform carried out in 2007 and 2008 has resulted in over 70,000 SMEs receiving loans; in Viet Nam, where the

<sup>59</sup> S. de Mel, D. McKenzie, C. Woodruff, Do informal firms want to formalise and does it help them if they do so?, *Finance & PSD Impact*, March 2012, Issue 17, page 2.

<sup>60</sup> *Ibid.*

<sup>61</sup> See [www.enterprise-development.org/](http://www.enterprise-development.org/).

<sup>62</sup> To date, DCED has 24 members: information is available at [www.enterprise-development.org/page/agencies-contacts](http://www.enterprise-development.org/page/agencies-contacts).

<sup>63</sup> *Supra*, note 25, page 4.

<sup>64</sup> *Supra*, note 12, page 16.

<sup>65</sup> *Ibid.*, page 17.

<sup>66</sup> *Ibid.*

<sup>67</sup> See, IFC and small and medium enterprises, factsheet, at [www.ifc.org/wps/wcm/connect/967d26804b7eee0986a5c6bbd578891b/IFC-SME-Factsheet2012.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/967d26804b7eee0986a5c6bbd578891b/IFC-SME-Factsheet2012.pdf?MOD=AJPERES).

<sup>68</sup> For instance, UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property (2010), UNCITRAL Legislative Guide on Secured Transactions (2007).

<sup>69</sup> See <http://smefinanceforum.org/post/ifc-and-partners-support-secured-lending-reforms-to-boost-financing-for-small-businesses-in-lat>.

reform was launched in 2012, it is estimated that around 54,000 SMEs have received loans.<sup>70</sup>

32. The IFC also manages several programmes aiming to increase and improve availability of capital to MSMEs; they include support to microfinance, development of innovative retail payment solutions, and funding to innovative banking models geared towards MSMEs. Furthermore, the IFC is among those organizations particularly active in promoting access to finance of MSMEs owned by women. IFC assists banks in various countries to better address the needs of this group of entrepreneurs: according to data provided in 2011, over 2,200 women entrepreneurs had been reached through these interventions.<sup>71</sup>

33. Another international organization, AfDB, launched the “Growth Oriented Women Entrepreneurs (GOWE) programme in Kenya (2006) and Cameroon (2007), providing a partial guarantee facility for women entrepreneurs and offering them capacity-building schemes. Over 600 hundred women entrepreneurs were trained and GOWE was extended to Tanzania and Zambia.<sup>72</sup> In the context of a partnership between the United States Agency for International Development (USAID) and Kenya financial institutions, one of the banks has introduced the Grace Loan, tailor-made for individual women entrepreneurs and women business groups to meet their working capital or business expansion.<sup>73</sup>

34. At the global level, work to remove economic barriers is also being carried out by the OECD, which has developed a “scoreboard” in order to collect data on the financing of SMEs so as to improve the understanding of their financing needs. The aim is to provide financiers, Governments and small businesses with relevant information to help grow businesses and help Governments monitor the implications of financial reforms on the access to finance of SMEs and entrepreneurs.

35. The United Nations Capital Development Fund (UNCDF) has developed several programmes to assist MSMEs in accessing low cost finance. Some of these programmes have been designed for specific groups of micro-entrepreneurs (for example, YouthStart intends to increase access to 200,000 youth in financial and non-financial services in sub-Saharan Africa) or to serve specific purposes (such as Cleanstart, which works to help poor households and micro-entrepreneurs to access financing for low-cost clean energy).

36. The Multilateral Investment Guarantee Agency (MIGA) has developed the Small Investment Program (SIP), specifically designed for small and medium investors investing in SMEs. MIGA also provides political risk insurance to financial institutions that will then lend to small and medium businesses through local affiliates.<sup>74</sup> Through the SIP, MIGA supports SMEs in various countries including conflict and post-conflict countries.<sup>75</sup>

#### 4. Regulatory and administrative barriers

37. As noted by the OECD, “[r]egulatory (and administrative) burdens have a strong cumulative effect on the business environment”.<sup>76</sup> These burdens include poor quality law-making, excessive paperwork, inefficiency/delayed decisions, inaccessibility of services, bureaucratic obstruction and abuse of authority. They are the result of a number of problems, including lack of capacity, over-centralization of authority, distrust of the private sector and corruption.<sup>77</sup>

<sup>70</sup> See A. A. de la Campa, Secured Transactions and Collateral Registries Program Access to Finance, IFC, power point presentation, 2013, available at [www.iamericas.org/en/programs-sp-998874089/secured-transaction-reform](http://www.iamericas.org/en/programs-sp-998874089/secured-transaction-reform).

<sup>71</sup> *Supra*, note 26, page 56.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> MIGA, Small Investment Program, available at [www.miga.org/documents/SIP.pdf](http://www.miga.org/documents/SIP.pdf).

<sup>75</sup> See MIGA, Annual Report 2013. Countries targeted by the programme include Afghanistan, Angola, Côte d’Ivoire, Georgia, Republic of Moldova and Libya.

<sup>76</sup> *Supra*, note 52, page 77.

<sup>77</sup> *Ibid.*

38. Several donors and international organizations assist developing countries in improving their regulatory regimes, focusing on both strengthening government policy-making capacity and developing the capacity of those affected by regulation to advocate for change.<sup>78</sup> For instance, until 2007, DFID funded a programme to strengthen the Government's regulatory capacity in Uganda, with the aim of improving the regulatory environment for business growth. Although not specifically targeting MSMEs, the project included the reform of regulations that had been identified as burdensome for MSMEs.<sup>79</sup> The Business Environment Strengthening for Tanzania Programme (BEST), launched in 2003 with the support of four bilateral donors (including DFID) and one multilateral donor,<sup>80</sup> and now in its second phase, has aimed, *inter alia*, at introducing reforms to simplify procedural and administrative barriers.<sup>81</sup> One of the key principles of the reform has been to separate the objectives of business registration, business regulation and revenue generation (i.e. taxation, fee collection etc.). More recently DFID, together with IFC and the EU has initiated a project to simplify and standardize municipal business regulation of small enterprises in Bangladesh with the aim of creating more transparent procedures through which enterprises approach the Government.<sup>82</sup> The IFC and USAID are partnering in Belarus to develop an enabling environment for MSMEs, including several activities to contribute to reducing the regulatory burdens associated with permits, licences, and other administrative procedures.<sup>83</sup>

39. Since the last decade, the World Bank, the IFC and USAID assist countries in various regions to develop one-stop shops in order to streamline start-up procedures for new businesses and reduce the burden of the business registration process. Lesotho is one of the countries that have been supported: reform has resulted in establishment of a one-stop shop for company incorporation and in the elimination of requirements for paid-in minimum capital and for notarization of articles of association.<sup>84</sup> Other countries that have received such assistance include Ukraine, Indonesia, Albania and Burkina Faso. In each of them, the introduction of one-stop shops has been complemented by simplification of administrative procedures such as: eliminating the minimal capital requirement for company incorporation and the requirement to have incorporation documents notarized (Ukraine); introducing a simplified application process allowing an applicant to simultaneously obtain both a general trading licence and a business registration certificate (Indonesia);<sup>85</sup> making notarization of incorporation optional (Albania); and allowing publication of start-ups to be done directly on the website of the one-stop shop, thus reducing the registration cost and streamlining the tax registration process (Burkina Faso).<sup>86</sup>

40. The United Nations Conference on Trade and Development (UNCTAD) has developed a programme aiming to facilitate the formalization of MSMEs through the automation of administrative procedures. The programme not only allows Governments to improve the organization of internal processing within and among the administrations involved (with the use of eGovernment tools), but also includes a methodology for the simplification of such procedures. Countries using this eRegulations system expect that the overall process will promote the registration of MSMEs.<sup>87</sup> In El Salvador, for example, MiEmpresa, allows entrepreneurs to

<sup>78</sup> USAID, *Removing barriers to formalization: the case for reform and emerging best practice*, 2005, page 26.

<sup>79</sup> *Ibid.*, page 27.

<sup>80</sup> The other bilateral donors are: the Denmark's development cooperation (DANIDA), the Swedish International development Cooperation Agency (SIDA), and the Royal Netherlands Embassy. The World Bank is the multilateral donor.

<sup>81</sup> See for instance the Tanzania Five Year Development Plan 2011/2012-2015/16 available at [www.tanzania.go.tz/pdf/FYDP-2012-07-26.pdf](http://www.tanzania.go.tz/pdf/FYDP-2012-07-26.pdf).

<sup>82</sup> See <http://archive.thedailystar.net/newDesign/news-details.php?nid=224296>.

<sup>83</sup> See [www.usaid.gov/where-we-work/europe-and-eurasia/belarus/private-sector-development-and-entrepreneurship](http://www.usaid.gov/where-we-work/europe-and-eurasia/belarus/private-sector-development-and-entrepreneurship).

<sup>84</sup> World Bank, *Doing Business 2013*, page 139.

<sup>85</sup> World Bank, *Doing Business 2012*, page 70.

<sup>86</sup> World Bank, *Doing Business 2010*, page 20.

<sup>87</sup> See press release "eRegulations system to formalize small businesses in four major Colombian cities" available at <http://unctad.org/fr/pages/newsdetails.aspx?OriginalVersionID=248> According

simultaneously register with several authorities, details the obligations of entrepreneurs when they join the formal economy, and provides access to information about benefits offered by public and private providers, such as credits, training and health insurance.<sup>88</sup>

## 5. Fees and financial requirement barriers

41. In several developing countries, complex tax regulations, poor tax administration, as well as high business registration and licensing fees disproportionately penalize MSMEs. A World Bank study, for instance, suggests that SME taxation regimes in Africa have been instrumental in the decision of firms to operate informally, and that redesigning SME tax regimes and adjusting related policies would “reduce the disincentive to enter the culture of compliance”.<sup>89</sup> Many African countries have thus carried out or initiated simplification of their tax systems in order to create an improved environment for MSMEs.<sup>90</sup> The Facility for Investment Climate Advisory Services (FIAS)<sup>91</sup> supports several of these efforts, like in Rwanda, where the Government has recently introduced “a flat tax regime for SMEs and has invested heavily in online tax facilities to help SMEs become tax compliant.”<sup>92</sup> In Mali, a single form for joint filing and payment of several taxes was also recently introduced and in the East African Community a programme was launched to promote harmonization of incentive regimes within the region to prevent a “race to the bottom” in tax competition.<sup>93</sup> In previous years, African countries that introduced tax simplification reforms included Burundi, Lesotho, Senegal and Sierra Leone. In 2011, for instance, a FIAS supported tax simplification project in Sierra Leone resulted in a 44 per cent increase in tax collection.<sup>94</sup> More broadly, in 2012, ICF implemented a new SME “tax system which minimizes the compliance burden of accounting for micro and small businesses and eases the administrative burden for the tax authority”.<sup>95</sup>

42. Projects addressing simplified tax reform for small business have been carried out in other regions, too. In the Lao People’s Democratic Republic, FIAS, in collaboration with the International Monetary Fund and the World Bank, provided advice in the drafting of a new tax code, which was adopted and is being implemented. In Armenia, amendments to the Law on Patent Fee reduced the tax compliance burden for MSMEs. Support to legislative reform in Georgia resulted in a new tax code in 2010 which was more responsive to the needs of MSMEs. More recently, training events for MSMEs were conducted in different regions to help them comply with the tax code.<sup>96</sup> A programme to simplify taxes for businesses in Bihar, India, was initiated by the World Bank Group in 2009 with the aim of reducing the time spent and costs incurred for MSMEs in paying their taxes. The programme resulted in new legislation that introduced a flat tax system in 2010, which was supplemented in 2012 by expanded online payment options.<sup>97</sup> According to the Bank, the reform has encouraged many businesses to register.<sup>98</sup> In Uruguay, implementation of an online

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to the (UNCTAD) e-Regulations website, countries which are benefitting from the system include Argentina, Benin, Burkina Faso, Cape Verde, Cameroon, Colombia, Morocco, and Viet Nam, just to name a few. For additional information: [www.eregulations.org/](http://www.eregulations.org/).

<sup>88</sup> See press release UNCTAD’s eRegistrations system puts entrepreneurs at centre of electronic governance in El Salvador <http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=217>.

<sup>89</sup> R. Stern, J. Loeprick, FIAS Tax Team, World Bank Group, *Small Business Taxation: Is this the Key to Formalization? Evidence from Africa and Possible Solutions*, 4 September 2007, page 2.

<sup>90</sup> L. Corthay, *Simplified taxation driving growth of SMEs, 2012*, available at [www.frontiermarketnetwork.com/article/432-simplified-taxation-driving-growth-of-smes](http://www.frontiermarketnetwork.com/article/432-simplified-taxation-driving-growth-of-smes).

<sup>91</sup> The FIAS programme is managed by the Investment Climate Department under the joint oversight of IFC, MIGA and the World Bank. For more information: [www.wbginvestmentclimate.org](http://www.wbginvestmentclimate.org).

<sup>92</sup> See <http://allafrica.com/stories/201310220069.html>.

<sup>93</sup> FIAS, 2012 Annual Review, page 35.

<sup>94</sup> FIAS, 2011 Annual Review, page 6.

<sup>95</sup> *Supra*, note 93.

<sup>96</sup> *Supra*, note 93, page 82.

<sup>97</sup> See [www.ifc.org/wps/wcm/connect/1c0bfe80407f5e5c86af96cdd0ee9c33/Stories+of+Impact+India+Tax+Simplification+FINAL.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/1c0bfe80407f5e5c86af96cdd0ee9c33/Stories+of+Impact+India+Tax+Simplification+FINAL.pdf?MOD=AJPERES).

<sup>98</sup> *Ibid.*

filing and payment system for capital, value added and corporate income taxes and improvement of the online facilities for social security contributions made paying taxes easier for SMEs.<sup>99</sup>

## V. Conclusion

43. Although not exhaustive, the survey presented above of the work that has been carried out by international organizations aiming at fostering the growth, development and formalization of MSMEs reveals certain themes. Much of the focus of the international community in this area to date has been on reducing economic barriers to MSMEs, on simplifying regulatory and administrative procedures to which they are subject, and on reducing costs for them, as well as raising their awareness of the availability of these programmes. While these efforts have enjoyed a certain degree of success, it has been suggested that more could be achieved to assist MSMEs by going beyond the promotion of these programmes and providing these enterprises with combined incentives, including access to market opportunities, to finance and to capacity-building.<sup>100</sup>

44. One component of a comprehensive approach to assisting the development of MSMEs that has not yet been fully explored is the development of an internationally recognized and harmonized approach to creating the legislative infrastructure to foster the development of MSMEs and to deal appropriately with them throughout their life cycle. Individual States have experienced notable success in developing such regimes domestically, but little has been done in terms of establishing a means of internationalizing that success.<sup>101</sup> The mandate entrusted by the Commission to Working Group I, starting with simplified business registration and incorporation and extending to additional issues, appears to be a natural complement to existing work being carried out globally and regionally to assist the development and growth of MSMEs.

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<sup>99</sup> *Supra*, note 84, page 144.

<sup>100</sup> IFC, *Closing the Credit Gap for Formal and Informal MSMEs*, 2013, page 25.

<sup>101</sup> For example, the Inter-American Juridical Committee (IJC), an advisory body to the OAS on juridical matters, considered at its meeting in March 2012 a model law on simplified stock corporations. The model law was based upon Colombian legislation adopted in 2008 on simplified stock corporations (Colombia *Ley sobre sociedades por acciones simplificadas*, Ley Número 1258 de 2008). The IJC reviewed favourably the text of the model law and passed a resolution (CJI/RES. 188 (LXXX-O/12) transmitting it to the Permanent Council of the OAS, for its due consideration (Annual Report of the Inter-American Juridical Committee to the Forty-Third Regular Session of the General Assembly, OEA/Ser. G, CP/doc. 4826/13, 20 February 2013, p. 68). The Permanent Council of the OAS has not yet taken up this matter.

**C. Note by Secretariat on Micro, small and medium-sized enterprises —  
Features of simplified business incorporation regimes**

**(A/CN.9/WG.I/WP.82)**

**[Original: English]**

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## **Introduction**

1. At its forty-sixth session in 2013, the Commission requested that a working group should commence work aimed at reducing the legal obstacles encountered by micro, small and medium-sized enterprises (MSMEs) throughout their life cycle. The Commission agreed that consideration of the issues pertaining to the creation of an enabling legal environment for MSMEs should initially focus on legal questions surrounding the simplification of business incorporation and registration. It was further agreed that other topics to be considered in the context of MSMEs at a later date included: (a) a system for resolving disputes between borrowers and lenders; (b) effective access to financial services; (c) guidance on ensuring access to credit; and (d) insolvency.<sup>1</sup>

2. As noted in the materials before the Commission and during its deliberations in 2013, in addition to reducing barriers to MSMEs entering the formal economy and thus, *inter alia*, helping them to maximize their economic potential, work on the simplification of business incorporation and registration could have additional salutary international effects. In particular, it was noted that an internationally recognized form of business registration could be expected to facilitate cross-border trade for MSMEs operating in regional markets, since it would provide a recognizable international basis for transactions and avoid problems that may arise because of a lack of recognition of the business form of the enterprise.<sup>2</sup>

<sup>1</sup> For a history of the evolution of this topic on the UNCITRAL agenda, see A/CN.9/WG.I/WP.80, paras. 5-12. The topic of MSMEs and insolvency is on the agenda of Working Group V for its Colloquium on 16-18 December 2013, and will be on the agenda of Working Group V at its 45th session from 20-25 April 2014.

<sup>2</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, paras. 316-319; Note by the UNCITRAL Secretariat, Microfinance: creating an enabling legal environment for micro-business and small and medium-sized enterprises, A/CN.9/780, para. 10.



3. This paper<sup>3</sup> is intended to provide preparatory materials to the Working Group so that it may commence its consideration of the initial focus of its MSME mandate from the Commission: the simplification of business incorporation and registration. The focus of this note is to provide an overview of selected legal regimes that have provided for simplified corporate forms for closely held corporations, and to provide a general comparison of the components of those regimes. It should be noted that some simplified non-corporate forms, based more on a partnership model than a corporate model, have been included in the discussion for comparison purposes.<sup>4</sup>

## I. Simplified corporate forms

4. Simplified corporate forms are a relatively new type of business association that aims to combine the most favourable aspects of more traditional partnership and corporate law in order to provide a more flexible and accessible business form for enterprises of all sizes. The increase in interest in many States in these new, more efficient business forms in the past two decades has been substantial; a number of States or regional groups have either adopted or are considering the adoption of legislation establishing simplified corporate forms in the expectation that these new regimes will enhance the health of their economy by creating investment opportunities, increased employment and higher economic growth rates. In some States, this movement has been aimed in particular at meeting the needs of MSMEs,<sup>5</sup> entrepreneurs and professionals, while in others it has formed part of a more general reform of their company law framework.

### A. Approaches to legislative reform

5. There appear to be three main approaches that States may take to legislative reform of their company law regimes.<sup>6</sup> The first approach that may be taken is to update the existing company law statute, but to leave the core of the company law system untouched. One advantage of this approach is that preservation of the existing core system provides an easy to use vehicle that provides lawyers and stakeholders

<sup>3</sup> This paper relies substantially on a paper prepared for the colloquium held by UNCITRAL on 16-18 January 2013 (Creating an Enabling Legal Environment for Microbusinesses) by Joseph A. McCahery, Erik P. M. Vermeulen and Priyanka Priydershini, "A Primer on the Uncorporation", later published by the European Corporate Governance Institute as Law Working Paper No. 198/2013 (March 2013) (available at [http://ssrn.com/abstract\\_id=2200783](http://ssrn.com/abstract_id=2200783)).

<sup>4</sup> Only a selection of the simplified corporate forms adopted by States and in force are included in this paper in order to illustrate the relevant differences in approach, to provide examples from different legal systems and to provide for geographic diversity: the Colombian Ley sobre sociedades por acciones simplificadas, Ley Número 1258 de 2008 ("Colombia SAS"); the French Société par actions simplifiée, as modified by Law No. 2008-776, La Loi de modernisation de l'économie, 4 August 2008 ("France SAS"); the German GmbHG German Limited Liability Act ("GmbHG/UG"); the German Handelsgesetzbuch (HGB) Commercial Code ("GmbH & Co./KG"); the Indian Companies Act, 2013 – Private and Public Limited Companies ("India LLC"); the Indian Limited Liability Partnership Act, 2008 ("India LLP"); the Japanese Companies Act (Part V, Part VI, Part VII and Part VIII), Act No. 86 of July 26, 2005 ("Japan LLC"); the New Zealand Limited Partnership Act 2008 (NZLPA); the New Zealand Companies Act 1993 ("NZ Co"); New Zealand Companies Act 1993 New Zealand Companies Act 1993 ("NZ Co"); the Singapore Limited Liability Partnerships Act, Chapter 163A (Original Enactment: 42 of 2005) Revised Edition 2006 (31st December 2006) ("Singapore LLP"); the South African Companies Act 2008 ("S Africa Co"); the United Arab Emirates (UAE) Commercial Companies Law, as amended 2013 ("UAE LLC", "UAE Public and Private Joint Stock Co"); the United Kingdom of Great Britain and Northern Ireland Limited Liability Partnerships Act, 2000, c. 12 ("UK LLP"); and the United States (Delaware) Limited Liability Company Act, Chapter 18, Delaware Code ("US LLC Delaware").

<sup>5</sup> Another paper prepared by the Secretariat for the twenty-second session of the Working Group (A/CN.9/WG.1/WP.81) explores the importance of MSMEs in the global economy and looks at specific barriers that they face in their operations.

<sup>6</sup> See, generally, Joseph A. McCahery, Erik P. M. Vermeulen, Masato Hisatake and Jun Saito (2007), "Traditional and Innovative Approaches to Legal Reform: The 'New Company Law'", European Business Organization Law Review, 8, pp. 7-57.

familiar provisions with which to work. In addition, this approach takes into account a network effect resulting from the use of a dominant corporate form by existing firms in a jurisdiction, and a learning effect, where only limited additional learning is required to use the regime.

6. The second approach that may be taken to the reform of a State's company law regime is to introduce a new business form but to link it explicitly to the traditional company law framework. This second approach may also have the advantage of the network and learning effects insofar as it links to the traditional regime, with the added benefit that it can provide a new but complementary regime more tailored for specific enterprises. In addition, any gaps in the new regime can be filled through resort to the traditional company law framework.

7. The third approach that may be taken to company law reform is to adopt a completely new and innovative legal statute. This approach may have the greatest innovative effect, but it also carries with it the greatest potential costs as users must change to the new system which initially has no established network and requires a significant investment in learning by stakeholders. In addition, the traditional company law framework cannot be used to fill any gaps in the new law, and there will be no established set of precedents to provide certainty in filling those gaps.

## **B. Enterprises that may benefit from simplified corporate forms**

8. The main focus of simplified corporate forms has been on creating flexible business forms that can be tailored to the specific needs of certain types of closely held corporations. As the average size of firms is decreasing,<sup>7</sup> more focus is being placed on the importance of MSMEs to the economy of States and on creating policies and the legal framework appropriate for the success of such enterprises. The adoption of simplified corporate forms has enabled SMEs, in particular, to become more competitive with larger businesses by offering partnership-type ease of operation and flexibility (as compared with the potentially burdensome and complex mandatory rules often required in more traditional incorporation regimes), limited liability for the partners in the business, and relative ease and simplicity of formation and registration. This maximization of the benefits of partnership and corporate structures offers to MSMEs wishing to formalize their business a flexible way to organize their enterprise and an affordable way to separate personal assets from those of the business venture.<sup>8</sup> In addition to offering broad flexibility and freedom of contract in establishing the internal governance of the enterprise, simplified corporate forms usually provide default provisions to fill any gaps that might exist in the rules established by the founders of the enterprise. These default rules can be particularly important for smaller or less-experienced business persons.

9. Other types of enterprises that can benefit from simplified corporate forms include family firms, which play an important economic role in many States, and particularly in emerging markets. The informal structure of family firms can provide timely and effective decision-making, a deep understanding of the local market, close ties with regulators and government officials and strong horizontal and vertical relations in the market. But these strengths may weaken over time, as the firm develops and grows. Difficult governance and reorganization issues may arise as changes occur in both the family and in the business life cycle. Family firms with attributes including clear governance rules and guidelines are more likely to thrive, and the flexibility of simplified corporate forms and the freedom of contract they afford businesses in establishing those rules and guidelines often provide solutions for problems that may develop.

<sup>7</sup> OECD, *Small and Medium Enterprise Outlook, Enterprise, Industry and Services*, 2000. See, also, Secretariat Note, A.CN.9/WG.I/WP.81.

<sup>8</sup> It should be noted that while many of these simplified corporate forms limit the purpose of the entity to any legal commercial purpose, it is also possible for these entities to have a social, rather than a commercial, aim.

10. Joint ventures may also benefit from simplified corporate forms. Unsuitable and rigid legal regimes have also presented problems for joint ventures and strategic alliances, which often require highly detailed and creative agreements. The flexibility offered by simplified corporate forms could greatly enhance the ability of such businesses to succeed. Moreover, the default provisions that often feature in simplified corporate forms may also offer some assistance in terms of filling the gaps that may exist in the special context of joint venture agreements.

11. Professional service firms are also likely to benefit from access to simplified corporate forms, particularly from limited liability partnerships. Rather than entering into a typical partnership structure where individual partners have unlimited liability for the debts of the entire partnership, professional service firms are increasingly relying upon limited liability vehicles to protect themselves. This is especially the case when partnerships grow and internationalize, such that partners have become virtual strangers, yet may still have unlimited liability in respect of each other.

### **C. Limited liability and other aspects of formation**

12. Limited liability protection, in which the financial liability of a partner or investor is limited to a fixed sum, usually the value of a person's investment in a company or partnership, is a standard feature of simplified corporate forms. Limited liability can play a crucial role for MSMEs in that it provides them with a means to separate personal assets from those owned by the business, thus protecting personal assets from exposure in the event that the business does not do well or becomes involved in legal disputes.

13. Another standard feature of simplified business forms is the creation of a legal entity, thus providing a legal existence for the organization, regardless of whether it is of the corporate or partnership variety. This status confers upon the entity the legal rights and duties it requires so as to function within a legal system, including the ability to acquire and hold property, to enter into contracts, to sue or be sued, and to act through agents.

14. An important feature of simplified corporate forms is that they can usually be created by a very small number of founders, and can thus be particularly appropriate for MSMEs. Business forms of the partnership type, including the limited liability partnership (LLP) in India, New Zealand, Singapore and the United Kingdom, usually require two or more partners to establish the business. In contrast, simplified forms of the corporate type, including the SAS in France and Colombia, as well as the limited liability corporation (LLC) in Japan, the UAE and the United States, and other company law regimes, will accommodate sole ownership structures.

15. In addition, formation of each type of simplified corporate form is quite easily accomplished, through registration of simplified documentation with the relevant authority — including, in some cases, easy online registration. Moreover, the cost of incorporation or registration of such businesses is generally quite low.

16. For example, the India LLP<sup>9</sup> and Colombia SAS may both be established easily via internet. Under the new SAS regime in Colombia, business parties can establish a SAS by filing a registration form with the Chamber of Commerce, as compared with the complicated and time-consuming incorporation requirements that apply to traditional business forms (including a minimum number of shareholders and the appointment of fiscal auditors). The simplified legislation allowed the Chamber of

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<sup>9</sup> Under the Indian LLP, the designated partners must apply for both a Designated Partner Identification Number and a Digital Signature Certificate. After registration, a trade name check is conducted, and the incorporation process is completed upon payment of the registration fee by credit card. The website also offers assistance in drafting the LLP agreement and registering the LLP.

Commerce to design an online system to facilitate the online filing of new SAS registrations. The SAS online incorporation process can take less than two hours.<sup>10</sup>

17. Importantly, simplified corporate forms do not typically include a minimum capital requirement, or require only a nominal amount, thus allowing greater access to formalization for much smaller entrepreneurs and enterprises.

18. In terms of financial disclosure rules for simplified corporate forms, as illustrated in the tables below, there is some variation in terms of the requirements of the selected regimes examined in this paper.

#### *Formation aspects*

Country	Colombia	France	Germany	Germany	India	India	Japan	NZ
<b>Type of company</b>	SAS (Sociedades por acciones simplificadas)	SAS (Société par actions simplifiée)	GmbH/UG <sup>11</sup>	GmbH&Co. KG <sup>12</sup>	Pvt Ltd (Private Limited Company) and Ltd Co (Public)	LLP (Limited Liability Partnership)	LLC (Limited Liability Company)	LP (Limited Partnership)
<b>Legislation</b>	Ley Número 1258 de 2008	La Loi de modernisation de l'économie, 4 August 2008	Mini-GmbHG German Limited Liability Act (Nov 2008)	Handelsgesetzbuch (HGB) German Commercial Code	Companies Act, 2013	Limited Liability Partnership Act, 2008	Companies Act (Parts V, VI, VII and VIII), Act No. 86 of July 26, 2005	Limited Partnership Act, 2008
<b>Legal personality</b>	Yes	Yes	Yes	No, but it has characteristics of legal capacity <sup>13</sup>	Yes	Yes	Yes	Yes
<b>Limited liability</b>	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes, except for General Partner (GP)
<b>Financial statements</b>	Shareholders must approve financial statements and annual accounts (art. 37)	Parties must disclose annual accounts	Annual financial statements are mandatory	Annual financial statements are mandatory (§238) <sup>14</sup>	Annual financial statements are mandatory (s. 129(1)) <sup>15</sup>	An annual return must be filed (s. 34)	Members have access	Annual financial statements mandatory, GP responsible for their preparation
<b>Formation</b>	Incorporation document filed at the Mercantile	Registration at the Commercial Court	Upon registration in Commercial Register,	GmbH&Co KG is formed upon conclusion of	Registration with Memorandum of	Online registration	Registration at the Legal Affairs Bureau	Registration at Registrar upon filing of Partnership

<sup>10</sup> The Chamber of Commerce of Bogota provides for a simple six-step process: (1) creation of an account, including application for a corporate name and tax identification number; (2) filing of the articles of incorporation (model articles are available to expedite the process); (3) online payment; (4) request to issue a digital signature; (5) digital signature of the incorporation documents; and (6) review of the documents by the Chamber of Commerce.

<sup>11</sup> A GmbH may also be incorporated with a minimum capital of less than €25,000, in which case a company will determine its own amount of minimum capital (€1-24999). Such a company cannot use the suffix GmbH, but must use the suffix UG (Unternehmergeellschaft/Entrepreneurial Company), which makes it transparent that this company has been established without the minimum capital requirement stipulated for a GmbH. The declared minimum capital must be paid in full prior to registration and contributions in kind are not allowed. Moreover, a UG is required to accumulate 25 per cent of its annual earnings as a legal reserve until it reaches the minimum capital requirement of a GmbH (€25,000). Although it is possible for a company to remain a UG, it is not the purpose of such regulation; therefore, a UG is not considered a separate type of business form, but only a temporary and transitional sub-form of a GmbH.

<sup>12</sup> The limited partnership with a private limited company as a general partner (GP) is a German law and tax construct. It combines the advantages of a partnership and the exclusion of liability of a private limited company. There are different reasons why the stakeholders want to limit the liability of the partnership, but the main focus of the construct is the limitation of liability of partners.

<sup>13</sup> A limited partnership can acquire rights and incur liabilities in its own name and may acquire property and other rights in rem in immovable properties and sue and be sued.

<sup>14</sup> Because the GP is not a natural person, the partnership must comply with higher demands on financial reporting (§264a) in addition to publication of financial statements in the Federal Gazette.

<sup>15</sup> In the case of a one person company, the financial statement should be signed by the company secretary or the director of the company (s. 134(1)).

Country	Colombia	France	Germany	Germany	India	India	Japan	NZ
	Registry (online registration) (art. 5)		company must pay up 25% of minimum capital, submit Articles of Association, list of shareholders and verified valuation of in-kind contributions (§7-8)	partnership agreement Registration in Commercial register is mandatory, however does not constitute the partnership	Incorporation and complying with the requirements of the Act in respect of registration			Agreement (Part 2, ss. 9 and 52)
<b>Number of founders</b>	1 or more (art. 1)	1 or more (art. L227-1)	1 or more persons	At least one limited partner (GmbH is the GP) who can be at the same time the only shareholder of GmbH/GP	One or more person, One Person Company (s. 3(1)) <sup>16</sup>	2 or more, but possible to have one partner for 6 months (s. 6)	1 or more	At least one general and one limited partner (Part 2, s. 8)

Country	NZ	Singapore	South Africa	UAE	UAE	UAE	UK	US
<b>Type of company</b>	Company (Private)	LLP	Pty Ltd (Proprietary Company)	LLC	Company (Public Joint Stock) <sup>17</sup>	Company (Private Joint Stock)	LLP	LLC (Delaware)
<b>Legislation</b>	Companies Act, 1993	Limited Liability Partnerships Act, 2006	Companies Act, 2008 (implemented May 2011)	UAE Company Law No. 8 of 1984 (amended multiple times)	UAE Company Law No. 8 of 1984 (amended multiple times from 1984 to 2000 by Federal Law)		Limited Liability Partnerships Act, 2000	United States (Delaware) Limited Liability Company Act
<b>Legal personality</b>	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Limited liability</b>	Yes	Yes, but claw-back provision before insolvency	Yes	Yes	Yes	Yes	Yes	Yes
<b>Financial statements</b>	Obligation to prepare annual reports except for non-active companies Part 2, ss. 208-211)	Accounts and other records must be kept for five years (s. 25)	Annual financial statements mandatory, no audit required	Companies are required to prepare financial statements and annual reports <sup>19</sup>	Three months from the expiry date of the financial year (art. 238)	Except for provisions regarding the public subscription of shares and debentures, the provisions governing public joint stock	An annual return and statutory accounts must be filed (Regulations, s. 7)	Members have access No public disclosure (§18-305)

<sup>16</sup> The New Companies Act 2013 provides a new form of private company, i.e., a one person company is introduced that may have only one director and one shareholder. The old Company Act 1956 had the requirement of a minimum of two shareholders and two directors in the case of a private company.

<sup>17</sup> Other commercial structures regulated by UAE company law are: General Partnerships, Simple Limited Partnerships, Joint Participation, Public Joint Stock Company, Private Joint Stock Company and Partnerships Limited with Shares. With the exception of the Private and Public Joint Stock Companies, most of them are not commonly used.

<sup>18</sup> The UAE Commercial Companies Law (CCL) is the main legislation governing the setting up of companies and carrying on of business in the UAE. LLCs are currently the most common form of corporate entity used by foreign investors in the UAE. The CCL governs the requirements and procedures for establishing a LLC. A copy of the Act was not available; all information is based on publicly available reports published after the reform of existing Companies Law in May 2013.

<sup>19</sup> See, generally, [www.tamimi.com/en/magazine/law-update/section-5/july-august-2/the-new-uae-commercial-companies-law-a-comparative-view.html](http://www.tamimi.com/en/magazine/law-update/section-5/july-august-2/the-new-uae-commercial-companies-law-a-comparative-view.html).

Country	NZ	Singapore	South Africa	UAE	UAE	UAE	UK	US
<b>Formation</b>	After registrar registers application, no need for constituting document (Articles of Association) (Part 2, ss. 11-13)	Online registration with Registry of Limited Liability Partnerships (s. 42)	Registration with Memorandum of Incorporation and Notice of Incorporation	By the Company's contract of establishment (COE), a separate agreement (equivalent to Memorandum and Articles of Association)	Memorandum and Articles of Association (arts. 64-94)	companies are applicable to a private joint stock company	Registration at Companies House (ss. 2-3)	Simple certificate of formation filed at Secretary of State  (§18-201)
<b>Number of founders</b>	1 or more persons	2 or more, but possible to have one partner for two years (s. 22)	1 or more persons	Old CCL - no less than two and no more than 50 shareholders (arts. 4 and 218) New CCL - one or more persons <sup>20</sup> (art. 71)	Old CCL - at least 10 founders New CCL - minimum five or more persons (art. 107) <sup>21</sup>	Old CCL - minimum of three New CCL - one or more persons (arts. 255/256) <sup>22</sup>	2 or more (s. 2)	1 or more (§18-101(6))

#### D. Internal governance

19. Partnership-type simplified business forms confer the status of legal entity on the business relationship and offer a clear and simple framework to economic actors who decide to enter into a joint ownership structure. It is also clear that, unless otherwise provided in the operating agreement among the partners in the business, the enterprise itself owns the firm-specific assets. In addition, the partners have joint control over firm-specific capital and, by default, share equally in the firm's profits and losses.

20. In contrast, the "equal-sharing rule" for losses and profits is not well-suited for enterprises in which business partners are not relatives or long-standing acquaintances. Nor may this approach be appropriate in instances where the founders of the business contribute unequal sums of capital, when they differ in levels and types of skills and when they are not in receipt of symmetrical information. As will be noted from the tables below, corporate-type simplified business forms usually provide for a default rule different from the "equal-sharing rule" in order to accommodate this different context.

21. In each of the partnership-type contexts examined in the table below, there is broad freedom of contract to establish the operating agreement, although some jurisdictions require certain mandatory rules to be included in the agreement. Generally, the partnership-type hybrid business form creates an ownership structure that gives owners joint management and control rights. Unless there is agreement to the contrary, important decisions, such as amendments to the partnership agreement, usually require the approval of all partners. However, matters arising in the ordinary course of business are commonly decided by a majority of the partners, and each partner, as an agent of the firm, is by default empowered to bind the partnership entity in dealings with third parties.

<sup>20</sup> The new CCL provides for the first time the concept of a one person or sole founder company. This applies to private joint stock companies and Limited Liability Companies.

<sup>21</sup> A Public Joint Stock Company can be established by a minimum of five founders, however under the old law the requirement was a minimum of 10 founders.

<sup>22</sup> Under the new law, the number of founding members has been reduced from three to two, as well as providing that private joint stock company may also be incorporated by a sole founder.

22. However, in the case of the corporate-type simplified business form, these issues may be treated somewhat differently. While broad freedom of contract with some mandatory rules also exists in this context, the management structure of an enterprise tends to require greater separation of ownership and control of the business than is the case in the partnership-type context. This differentiated management and control structure is one in which members elect directors and participate in certain basic decisions, while directors establish policy, select managers, perform monitoring functions and act as the firm's agents.

23. This different approach to the management structure in the case of the corporate-type form may require more detailed internal governance rules. Since the majority shareholders elect the directors and can thus control management, the minority shareholders in this situation may be particularly vulnerable to abuse and rules may be required to ensure that minority interests are protected. This may be accomplished by using different classes of shares that have identical voting rights but that may vote separately as classes for the election of specified numbers of board members. An alternative approach could be cumulative voting, where the minority may cast all of its board of director votes for a single candidate. However, the best mechanism to deter opportunistic behaviour may be through the establishment of fiduciary duties, which is examined in greater detail below.

### *Internal governance*

<i>Country</i>	<i>Colombia</i>	<i>France</i>	<i>Germany</i>	<i>Germany</i>	<i>India</i>	<i>India</i>	<i>Japan</i>	<i>NZ</i>
<b>Type of company</b>	SAS	SAS	GmbH/UG	GmbH&Co.KG	Pvt Ltd and Ltd Co (Public)	LLP	LLC	LP
<b>Governance</b>	Flexible; Shareholders may manage the company directly (art. 17)	Parties are free to decide on the management structure Compulsory to have a 'President' (arts. L227-6 and -9)	At least one director If there are more directors, they must act collectively unless Articles of Association state otherwise (§35) A company with 500 or more employees must have a supervisory board (§52)	Management is conducted solely by GmbH-GP (§164)	Appointment of independent directors by minority shareholders	Member-managers, unless otherwise provided in the agreement (s. 23 and First Schedule)	Flexible	Management is conferred upon GP(s). Limited partner must not take part in the management
<b>Financial rights</b>	In absence of agreement (special classes of shares), sharing in proportion to shareholding (art. 10)	In absence of agreement, sharing in proportion to members' contributions (art. L227-9)	Distribution of profit to shareholder is proportional to their shareholdings unless stated otherwise in Articles of Association (§29)	If not stipulated otherwise by partnership agreement, profit shall be distributed proportionately	Memorandum of Incorporation shall regulate distribution of profit among shareholders	In absence of agreement, equal sharing rights (s. 23 and First Schedule)	In absence of agreement, sharing in proportion to the equity participation	The entitlement of partners to distribution of profit must be stipulated in Partnership Agreement.
<b>Freedom of contract</b>	Yes, but some mandatory rules	Yes, but some mandatory rules	Yes, but many mandatory rules.	The relations among partners stipulated in §161 et seq. are largely dispositive	Yes, but there are mandatory rules	Yes, but some mandatory rules (s. 23)	Yes, but some mandatory rules	Yes, with some mandatory provisions. (Part 2, s. 9)
<b>Transferable interest</b>	Yes, restrictions could be contractually imposed (arts. 13 and 14)	Restricted transferability	Interest in GmbH is transferable unless stated otherwise in Articles of Association (§15).	Transfer of interest is possible upon modification of partnership agreement Must registered with Commercial Register	Freely transferable Any arrangement between 2 or more persons in respect of transfer shall be enforceable as a contract	LLP agreement – default rule: assignment of financial rights (s. 42)	Members' unanimous approval required	Freely transferable to another partner Transferable to any other person upon approval by resolution of partnership (Part 2, s. 38)

Country	NZ	Singapore	South Africa	UAE	UAE	UAE	UK	US
<b>Type of company</b>	Company (Private)	LLP	Pty Ltd	LLC	Company (Public Joint Stock)	Company (Private Joint Stock)	LLP	LLC (Delaware)
<b>Governance</b>	Flexible, governance power may be conferred directly on shareholders (Part 8, s. 126)	Member-managers, unless otherwise provided in the agreement (s. 10 and First Schedule)	Flexible; Shareholders may manage company directly (Ch.2 Part F, s. 57)	By Managers <sup>23</sup>	By a Board of Director structure	By Managers Subject to corporate governance rules	Member-managed, unless otherwise provided Mandatory designated members (Regulations, s. 7)	Member-managed, unless otherwise provided in the agreement (§18-402)
<b>Financial rights</b>	Proportional share of dividends per share (Part 6, s. 53)	If no agreement, sharing in proportion to the equity participation (First Schedule)	Memorandum of Incorporation shall regulate distribution of profit among shareholders, otherwise the distribution is proportional to their contribution	Memorandum of Incorporation shall regulate distribution of profit among shareholders, otherwise the distribution is proportional to their contribution (Art 19 and 227)	Memorandum of Incorporation shall regulate distribution of profit among shareholders	Memorandum of Incorporation shall regulate distribution of profit among shareholders	In absence of agreement, equal sharing rights (Regulations, s. 7)	In absence of agreement, profits and losses allocated on the basis of the agreed value of the contribution (§18-503)
<b>Freedom of contract</b>	Yes, however many mandatory rules. (Part 5, s. 31)	Yes	Yes, but many unalterable provisions	Yes, but there are mandatory rules	Yes, but bound by Federal law	Yes, but bound by Federal law	Yes, but some mandatory rules	Yes, complete freedom (§18-1101)
<b>Transferable interest</b>	Shares are transferable unless stated otherwise in the constitution of the company (Part 6, s. 39)	LLP agreement – default rule: assignment of financial rights (s. 13)	Memorandum of Incorporation must restrict transferability and must prohibit an offer of its securities to public	Without restriction (except as noted in arts. 4 and 218)	Without restriction (except in case of lock-up period as noted in CCL)	Without restriction between founders (in other cases follow arts. 216 and 217)	Restricted transferability	Yes, restrictions could be imposed by the agreement (§18-702)

## E. Fiduciary duties

24. Fiduciary duties tend to be open-ended standards of performance. They are often separated into: (1) a duty of care and loyalty; (2) a duty to disclose information; (3) a duty to preclude from self-dealing transactions, personal use of business assets, usurpation of enterprise opportunities, and competition with the enterprise; and (4) a duty of good faith and fair dealing.

25. Fiduciary duties offer protection against the managers' pursuit of personal interest and any excessively negligent behaviour on their part. However, fiduciary duties cannot be used to discipline directors in the performance of their official duties, thereby subjecting their business judgement to criticism after the fact. It should also be noted that it is not yet clear in most cases<sup>24</sup> whether members or partners in simplified corporate forms owe a fiduciary duty to each other.

<sup>23</sup> Under the New CCL, companies may appoint one or more managers without setting out a maximum number of managers (art. 83). However, under the old law, the maximum number of managers was five.

<sup>24</sup> The United States Revised Uniform Limited Liability Act of 2006 clarifies the ability of members to define and limit the duties of loyalty and care that members owe each other and the LLC. Likewise, Delaware General Corporation Law, Section 102(b)(7), allows the articles of incorporation to include a provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director,



*Fiduciary duties*

Country	Colombia	France	Germany	Germany	India	India	Japan	NZ
<b>Type of company</b>	SAS	SAS	GmbH/UG	GmbH&Co.KG	Pvt Ltd and Ltd Co (Public)	LLP	LLC	LP
<b>Fiduciary duties</b>	'Abuse of rights' provision (Article 43)	Good faith – Articles of Association could contain more detailed duties (art. L227-8)	The director has to act with duty of care equal to a prudent businessman (§43)	Disclosure of partnership's financial records to limited partners (§166)	Directors shall act in good faith and in the best interests of the company (s. 166)	Defined by agreement – default provision in First Schedule: disclosure and non-compete	Good faith	Specific fiduciary obligations of GP(s) (Part 2, s. 49)

Country	NZ	Singapore	South Africa	UAE	UAE	UAE	UK	US
<b>Type of company</b>	Company (Private)	LLP	Pty Ltd	LLC	Company (Public Joint Stock)	Company (Private Joint Stock)	LLP	LLC (Delaware)
<b>Fiduciary duties</b>	Directors must act in best interest of a company (Part 8, s. 126)	Defined by agreement – default provision in First Schedule: disclosure and non-compete	Directors are required to act in good faith for a proper purpose in the best interest of a company	Managers shall act in good faith and in the best interests of the company <sup>25</sup>	Directors shall act in good faith and in the best interests of the company. (arts. 21-22)	Directors shall act in good faith and in the best interests of the company (arts. 21-22)	Specific default duties (Regulations, s. 7)	Access to information and records (§18-305)

**F. Potential for misuse****1. Disclosure of beneficial ownership**

26. It has been noted that the low cost and relative ease of establishing simplified business forms may attract those who wish to establish corporate vehicles in order to avoid detection due to their involvement in criminal activities such as money-laundering and financial crime. These vehicles may include corporations, trusts, foundations, and limited partnerships, as well as simplified business forms, and may involve the creation of a chain of cross-border company law vehicles created in order to conceal their ownership.

27. In order to control this type of misuse, international institutions have taken steps to introduce measures that make information about the beneficial owners that control these chains of companies more readily available. For example, the Organisation for Economic Cooperation and Development (OECD), which is one of the institutions concerned with combating corruption and money-laundering, has set out a number of policy objectives in order to prevent the misuse of corporate vehicles.<sup>26</sup>

provided, inter alia, that such provision shall not eliminate or limit the liability of a director: (i) for any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; or (iii) for any transaction from which the director derived an improper personal benefit. These types of provisions may be useful in the context of closely held business entities, since they allow the parties to derogate from a rigid legal framework, which may not be necessary in all business contexts, while still requiring appropriate protection for the business, shareholders and third parties.

<sup>25</sup> The general obligations placed on managers arise from a number of sources, including the Company's COE, the CCL and UAE Penal Code.

<sup>26</sup> See OECD, *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes*, 2001. See, also, the work of the United Nations Office on Drugs and Crime (UNODC), which is responsible for the Global Programme against Money-Laundering, Proceeds of Crime and the Financing of Terrorism, the aim of which is to strengthen the ability of Member States to implement measures in these areas, and to assist them in detecting, seizing and confiscating illicit proceeds ([www.unodc.org/unodc/en/money-laundering/index.html?ref=menuaside](http://www.unodc.org/unodc/en/money-laundering/index.html?ref=menuaside)).

## 2. Financial Action Task Force (FATF)

28. The Financial Action Task Force (FATF) is an intergovernmental body that was established by its constituent members in 1989 to set standards and to promote effective implementation of legal, regulatory and operational measures to combat money-laundering, terrorist financing and other related threats to the integrity of the international financial system. To that end, the FATF has developed a series of recommendations that are recognized as the international standard for combating money-laundering and the financing of terrorism and proliferation of weapons of mass destruction. They form the basis for a coordinated international response to these threats to the integrity of the financial system and help ensure a level playing field. The FATF Recommendations were first issued in 1990 and were most recently revised in 2012.

29. The 2012 Recommendations encourage States to implement stricter rules and regulations that require companies or company registries to obtain and hold current information on companies' beneficial ownership and control,<sup>27</sup> or to have other comparable measures to ensure that such information is readily available. Importantly, the FATF acknowledges that the implemented measures should be proportionate to the level of risk and/or complexity related to the use of beneficial ownership structures, which reduces the cost of regulations and increases compliance.

30. Additional protection from the potential misuse of simplified corporate forms may be available through the requirement for all corporate vehicles to open bank accounts in order to conduct their business activities; bank accounts, in turn, usually require the submission of tax and corporate identification numbers. It has been suggested that financial institutions are the most suitable parties to prevent and combat money-laundering, while lawyers and other legal professionals provide an extra layer that serves as a safety net to ensure the financial system is not used for improper purposes. Consequently, it is important to encourage collaboration and information exchange between relevant regulators, supervisory authorities, intermediaries and private companies. The FATF emphasizes both national and international cooperation in relation to combatting fraud and other illicit activities.<sup>28</sup>

## 3. Intragovernmental collaboration and information sharing

31. Since information in respect of the beneficial ownership of corporate vehicles is increasingly important to combat illicit activities, such information must be accessible to regulators, supervisory authorities and similar government officials. Reforms in respect of the improvement of intragovernmental collaboration have been aimed at collectively detecting and deterring money-laundering and tax evasion, in addition to obtaining information about the beneficial ownership of corporate vehicles.<sup>29</sup>

32. Despite the effectiveness of domestic information sharing among government agencies, there is a need for information exchange on an international scale. The

<sup>27</sup> See International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations, Part E on Transparency and Beneficial Ownership of Legal Persons and Arrangements, in particular, Recommendation 24 ([www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf)).

<sup>28</sup> *Ibid.*, Part G on International Cooperation, in particular, Recommendations 36 and 40.

<sup>29</sup> See OECD, *Effective Inter-Agency Co-Operation in Fighting Tax Crimes and Other Financial Crimes*, 2nd ed., 2013. For example, Singapore has streamlined its company registration system and created a one-stop business services portal that allows government agencies to access secure information, including tailor-made information packages. Similarly, Australia formed a multi-agency task force in 2006 to protect the integrity of the financial and regulatory systems. The task force combines the powers of several government agencies and authorities to conduct investigations, audits and prosecutions, and while not the main goal, it has provided transparency in respect of beneficial ownership arrangements. See, also, the amendments that New Zealand is proposing for its Companies Act and its Limited Partnerships Act in order to address the potential misuse of its corporate forms by, inter alia, providing the Companies Office Registrar the power to inquire into the identity of the beneficial ownership and control of these companies (see Companies and Limited Partnerships Amendment Bill, NZ House of Representatives Supplementary Order Paper No. 403, 19 Nov. 2013).

globalization of, and innovations in, financial markets require a commensurate intensification of the international collaboration among regulators and other enforcement bodies.<sup>30</sup>

## G. Conflict resolution

### 1. Derivative suits

33. One important aspect of simplified corporate forms is that their members or partners must usually rely more heavily on judicial gap-filling to ensure that their rights are protected. Some jurisdictions provide for derivative suits, imported from more traditional business association regimes,<sup>31</sup> which allow one or more members or partners to initiate a derivative suit in the name of the enterprise and for the benefit of the enterprise as a whole. Derivative suits constitute an exception to the usual rule that a company's board of directors manages company affairs.

34. However, derivative suits can generate high litigation costs and great uncertainty, and some jurisdictions have placed restrictions on them in order to prevent a disgruntled minority member or partner from acting in their own interest and using such suits to interfere with the successful operation of the enterprise.<sup>32</sup>

35. For simplified corporate forms, the question of how to resolve disputes among members of the firm may have several possible answers. One solution may be to provide for appropriate exit rules so as to lower costs for stakeholders when parties leave the business. In addition, such rules may establish a degree of predictability when such scenarios arise.

### 2. Exit rules

36. Default exit rules in legislation establishing simplified corporate forms could provide members or partners in the enterprise with the power to compel the dissolution of the firm and the liquidation of its assets. Such rules could also permit individual members or partners to withdraw and/or be expelled from the firm upon the receipt of fair value of their ownership interests.<sup>33</sup>

37. In order to avoid the possibility of a minority interest using the exit rules opportunistically, and to improve the overall stability of the enterprise, it could be argued that limitations should be placed on exit rights in the case of simplified corporate forms. However, rather than locking participants into an unwanted business arrangement, lawmakers could define specific default rules that comprise the different involuntary and voluntary exit provisions. Establishing clear default rules could not only reduce litigation costs, but could also allow for greater settlement of disputes. As the valuation of a member's or partner's interest can be a particularly difficult

<sup>30</sup> Note that UNODC maintains and administers the International Money-Laundering Information Network (IMoLIN), a one-stop anti-money-laundering/countering the financing of terrorism research resource on behalf of a number of intergovernmental organizations and groups active in this area, including FATF. The multi-faceted website serves the global anti-money-laundering community by providing information about relevant national laws and regulations, as well as providing contacts for inter-country assistance and identifying areas for improvement in domestic laws, countermeasures and international cooperation ([www.unodc.org/unodc/en/money-laundering/imolin-amlid.html?ref=menuse](http://www.unodc.org/unodc/en/money-laundering/imolin-amlid.html?ref=menuse)).

<sup>31</sup> For example, the United States (Delaware) LLC provides for a traditional derivative suit in Subchapter X.

<sup>32</sup> For example, it may be required that the minority shareholder own stock both at the time of the challenged action and throughout the course of the law suit, that any out-of-court settlements be subjected to judicial scrutiny to avoid abuse, and that any recoveries resulting from the derivative suit go to the enterprise and do not benefit shareholders directly.

<sup>33</sup> The default provision on expulsion in the Regulations to the UK LLP Act provides that: "No majority of the members can expel any member unless a power to do so has been conferred by express agreement between the members." The same rule appears in the First Schedule of the Singapore and India LLP Acts. The default provision of the Colombian SAS provides for shareholder exclusion from the corporation by a majority decision and upon receipt of fair market value for their shares (art. 39).

issue, default exit rules should also establish clear valuation rules. For example, such rules could state that dissociating shareholders should receive the same amount in a buyout as they would receive if the company were dissolved. In addition, specific rules could be established to determine when goodwill should be taken into account.

### **3. Specialized business courts and procedures**

38. Judicial intervention may also be used to protect participants in simplified corporate forms, but this type of adjudication may be costly and time-consuming. In addition, it has been suggested that it may be difficult for a court to disentangle the personal relationships often at stake in such situations.

39. Some success has been seen in respect of specialized business courts, such as the Inquiry Procedure before the Dutch Enterprise Chamber (a division of the Amsterdam Court of Appeals) which has become a leader in the resolution of disputes against controlling shareholders of non-listed companies. In particular, the granting of injunctive relief has induced business parties to seek out settlements that might otherwise end up in litigation. Five factors key to the success of the Enterprise Chamber have been identified as: (1) its integrity and speed; (2) its level of deference to insiders; (3) its ability to focus on the key underlying issues before it; (4) the degree of formalism in its decisions; and (5) the concern it has for the effect of its decisions on other corporate actors. Parties benefit from the reduced cost as well as the consistent quality of the decisions and the inducement to settle matters in a less formal setting.

40. Another system has been established in Colombia, in which a new specialized Corporate Law Court was established in the Superintendencia de Sociedades (Office of Corporations) in order to adjudicate issues arising pursuant to the SAS legislation. While complaints filed before the specialized court from 2008 to 2011 related only to four different issues (appeals of previous decisions, intra-corporate disputes, actions to set aside shareholder resolutions and requests for dissolution), the court has heard and resolved a broader array of issues from 2012 to date. These include: actions to lift the corporate veil, the appointment of experts to provide appraisals to parties, and actions arising from the abuse of rights provision in the SAS. The broader range of cases examined by the Court, along with the quality of the decisions rendered and the speed of the decisions is reportedly providing credibility to the Court and indicating that its establishment has been a successful experiment in adjudicating in this specialized business context.<sup>34</sup>

## **II. Information in respect of simplified corporate forms**

### **A. Factors for success of simplified corporate forms**

41. The success of simplified corporate forms in general has been attributed to the fact that they typically bundle together a number of advantageous aspects from both corporate law features and partnership principles for the benefit of enterprises of all sizes. These key advantages are generally agreed to be limited liability for stakeholders coupled with maximum flexibility and autonomy for firm participants to contractually establish the firm's governance structure. In addition, simplified corporate forms have the added advantage of requiring a much-reduced burden in terms of future documentary and operational formalities than under traditional corporate regimes. Moreover, like traditional corporate forms, simplified corporate forms still provide members with almost a complete shield against personal liability, but with the added advantage that they do not impose burdensome formation and capital maintenance rules.

42. Other aspects of simplified corporate forms that have contributed to their success have been the fact that they allow for formalization of the enterprise in an

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<sup>34</sup> Francisco Reyes Villamizar, *The Colombian Simplified Corporation: An Empirical Analysis of a Success Story in Corporate Law Reform* (November 2013) (Available at SSRN: <http://ssrn.com>).

accessible and understandable form, which is achieved by way of a simple and fast procedure at a very low cost. These factors have greatly increased the accessibility of formalization for businesses of all sizes and levels of sophistication, but in particular for those on the micro and small end of the scale.

43. Most simplified business regimes provide that contributions for payment of shares or interests can be made in many different forms, such as tangible or intangible property, or other benefits to the firm, including cash, promissory notes, services, or other agreements to contribute cash or property, or contracts for services to be performed.<sup>35</sup> In addition to acceptance of a broad range of contributions, such regimes have the advantage of providing a great deal of flexibility regarding the internal organization of the enterprise, so as to allow the founders of the business to tailor the regime as much to their own context as they wish, or to rely mainly on default provisions. Default provisions not only fill intentional or unintentional gaps in the parties' agreement, but they have the added advantage of providing rules that are based on the traditional company law regime, and thus are both well-established and well-understood.

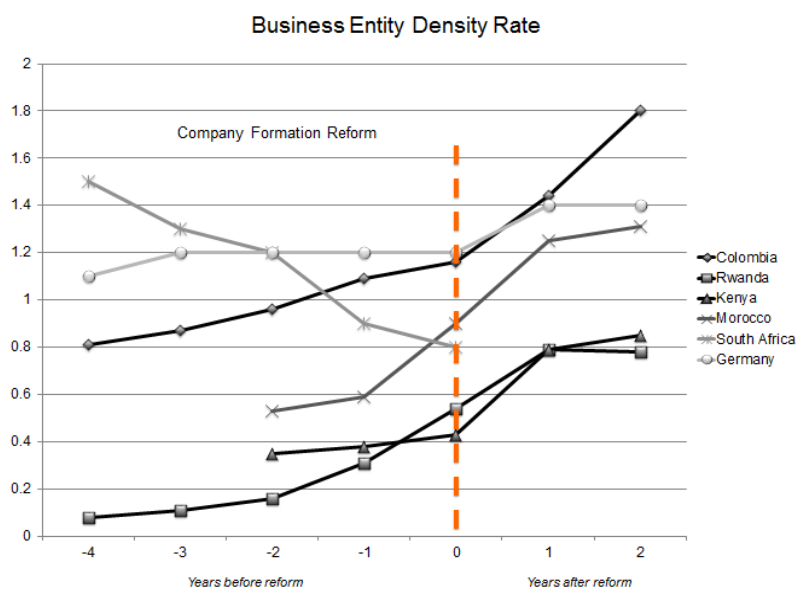
44. One disadvantage of adopting simplified corporate forms may be that they can be relatively untested entities that have not yet generated a large body of case law and academic research. However, the knowledge and information base pertaining to these simplified regimes is growing rapidly, as may be seen from the information presented below.

## B. Empirical information on simplified corporate forms

45. Company law reforms — particularly when they modernize the traditional company law systems in terms of the implementation of simple formation requirements, online business registrations and easy access to limited liability — tend to improve the Business Density Rate (which is the number of newly registered companies with limited liability per 1,000 working-age people per calendar year). Figure 1 provides this information in respect of selected States that have modernized their traditional company law systems as described, and indicates that there is a positive relationship between the reforms and an increase in the number of new businesses registered.

Figure 1

### Company Law Reform and Business Registrations (Source: World Bank Data)



<sup>35</sup> See, for example, s. 32 of the India LLP and §18-101(c) of the US-Delaware LLC.

46. In terms of specific numbers of business registrations in particular States, some data is available as well. For example, the SAS in Colombia was introduced in December 2008 (when it comprised 7.42 per cent of the total number of business association registrations), and by 2010, the SAS represented 82 per cent of all registered companies. As of September 2013, 96.4 per cent of business entities that filed articles of association with the Commercial Registry did so under the SAS regime. Importantly, the number of SAS cancellations is quite low in comparison with the number of registrations that remain active and in good standing: in 2011, 2,315 SASs were dissolved or wound up; in 2012, the figure amounted to 3,669 SASs; and to the end of July 2013, 3,038 SASs were dissolved or wound up.<sup>36</sup>

<i>Year</i>	<i>Total SAS Registrations</i>	<i>As a percentage of all incorporations</i>
<b>2009</b>	17,840	74.2%
<b>2010</b>	37,371	82%
<b>2011</b>	49,024	92.4%
<b>2012</b>	55,359	93.1%
<b>2013</b>	46,950 (as of end Sept.)	96.4%

47. Statistics are also available from Colombia on the size of company that is registering as an SAS incorporation. The following table illustrates the size of the enterprise, the criteria for each under Colombian law, and the number of SAS incorporations in each category in 2011, 2012 and as of the end of September 2013.<sup>37</sup>

<i>Size of company</i>	<i>Number of employees</i>	<i>Total assets</i>	<i>2011</i>	<i>2012</i>	<i>As of Sept. 2013</i>
<b>Micro</b>	1-10	Under 501	96,831	13,739	167,061
<b>Small</b>	11-50	501-5,000	14,827	23,341	31,818
<b>Medium</b>	51-200	5,001-30,000	3,709	5,797	8,073
<b>Large</b>	Over 200	Over 30,000	875	1,398	2,008

48. Since the adoption of the SAS in 2008 in France, the number of new companies incorporating under the SAS regime has grown steadily. In 2009, the SAS represented over 10 per cent of new incorporations; that figure grew to over 14 per cent in 2010 and up to 16 per cent in 2011.

49. The LLP in India was first introduced in 2009; as of 28 May 2012, 9,395 LLPs were active in India. There are, as yet, no data available in respect of the number of incorporations under the new company regime, which was adopted in May 2013.

50. The LLC in Japan has grown steadily in popularity, growing from 4,066 business registrations in 2006 to 15,772 in 2010.<sup>38</sup> However, the formal corporate regime remains by far the preferred choice of a business form in Japan.

51. In Singapore, 5,234 LLPs were incorporated between 2006 and 2008. This amounted to approximately 8 per cent of all newly established private firms registered each year.

52. The LLP in the United Kingdom has been quite successful since its creation in 2001, reaching over 52,000 registrations in 2012. The annual number of business registrations under the LLP regime in the United Kingdom is reflected in the table below.<sup>39</sup>

<sup>36</sup> For more detailed empirical information on the Colombian SAS, see Reyes Villamizar, *The Colombian Simplified Corporation*, supra, note 34.

<sup>37</sup> Ibid.

<sup>38</sup> The number of LLC registrations in Japan in 2007 was 9,557; in 2008 that figure rose to 10,785, and in 2009, the number of Japanese LLC registrations was 13,667.

<sup>39</sup> Reproduced from Francisco Reyes and Erik P. M. Vermeulen, *Company Law, Lawyers and "Legal" Innovation: Common Law versus Civil Law, Banking and Finance Law Review*, 2013.

<i>March (Year)</i>	<i>Total LLP Registrations</i>	<i>Annual Increase</i>
<b>2002</b>	1,845	1,845
<b>2003</b>	4,442	2,597
<b>2004</b>	7,396	4,799
<b>2005</b>	11,924	4,528
<b>2006</b>	17,499	5,575
<b>2007</b>	24,555	7,056
<b>2008</b>	32,066	7,511
<b>2009</b>	38,443	6,377
<b>2010</b>	40,604	2,161
<b>2011</b>	45,376	4,772

53. Finally, the LLC regime has become the choice of business form for closely held firms in the United States. According to data derived from the Annual Reports, Delaware Department of State, Division of Corporations, in 2011, LLCs comprised 70 per cent of all business registrations, while corporations made up the next biggest group at 22 per cent, LLP registration amounted to 6 per cent, and statutory trusts comprised 2 per cent.

### III. Issues for possible discussion

54. The Working Group may wish to consider the following non-exhaustive list of issues in its discussion:

- (a) States may wish to provide their experience in terms of incorporation procedures for closely held businesses, including in respect of the following issues:
  - (i) Is easily accessible limited liability protection available?
  - (ii) Is online registration possible and desirable?
  - (iii) Is there a single point of entry for enterprises wishing to formalize?
  - (iv) How are creditors and other stakeholders protected?
  - (v) Is disclosure of beneficial ownership required?
  - (vi) Is there intragovernmental and cross-border collaboration and sharing of information?
- (b) What should be the preferred internal governance structure for the simplified corporate form?
  - (i) Should the focus first be on smaller and micro-sized enterprises or should the simplified regime be capable of accommodating businesses of all sizes?
  - (ii) Should the focus be on creating a single regime or on creating various possible regimes?
- (c) Would the Working Group like to consider the possible attributes that a draft text on simplified business incorporation might contain?
- (d) Does the Working Group currently have any view on what form its work on simplified business incorporation should take, i.e. a model law with or without a guide to enactment, a legislative guide, or some other text?

## D. Note by Secretariat on Observations by the Government of Colombia

(A/CN.9/WG.I/WP.83)

[Original: English]

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## Annex

### The Colombian Simplified Corporation: an empirical analysis of a success story in corporate law reform \*

#### I. Introduction

1. Law 1258 was enacted in Colombia on December 5, 2008.<sup>1</sup> During the last five years the country has witnessed a revolutionary turnaround in its Corporate Law.<sup>2</sup> This legislation introduced a new type of business entity referred to as the Simplified Corporation or *Sociedad por Acciones Simplificada* (also known as SAS, according to its acronym in Spanish).<sup>3</sup> Following the most progressive approach to Corporate Law, this law reduced incorporation formalities to a simple filing before the Mercantile Registry. It also streamlined costs and requirements associated with the formation and operation of boards of directors, fiscal auditors, purpose clauses, and other formalistic requirements that existed before its enactment. Law 1258 made it clear that shareholders would be shielded from any liability concerning obligations arising from the business activities of the corporation. It also reduced old-fashioned prohibitions pertaining to shareholders and managers activities and, most significantly, it reinforced an effective principle of freedom of contract. Furthermore,

\* The attached observations on a Model Act on Simplified Corporations was authored by Francisco Reyes Villamizar. This article is a summary of the following papers by the same author: *The Colombian Simplified Corporation An Empirical Analysis of a Success Story in Corporate Law Reform* (November 2013), Available at SSRN: <http://ssrn.com/> and *Modernizing Latin American Company Law: Creating an All-Purpose Vehicle for Closely Held Business Entities — The New Simplified Stock Corporation* (September 9, 2011). Penn State International Law Review, Vol. 29, No. 3, 2011. Available at SSRN: <http://ssrn.com/abstract=1925092> or <http://dx.doi.org/10.2139/ssrn.1925092>.

<sup>1</sup> Official Gazette N.47.194 of December 5th of 2008.

<sup>2</sup> Colombia is a Latin American developing country. It is a mid-size economy (the fourth in Latin America after Brazil, Mexico and Argentina). According to the World Bank its GDP for 2012 was US\$369.8 billion and it is ranked 30th within 214 countries on the GDP 2012 index (see: [www.worldbankgroup.com](http://www.worldbankgroup.com)).

<sup>3</sup> The entity's name was taken from the French legislation enacted in 1994 concerning the *Société par Actions Simplifiée*. Additional legal provisions of the Colombian SAS were also transplanted from the French model. However, the entity also derives its inspiration from US and Colombian sources. In fact, certain reforms initiated in Colombia almost 20 years ago (Law 222 of 1995), which had had a limited impact in the business community were reviewed and incorporated within the SAS law.



by applying the method of *structural transplants*, this law also introduced an innovative enforcement environment where arbitration and administrative adjudication superseded inefficient judicial procedures.

2. The creation of this type of entity has changed the manner in which people do business in Colombia. The SAS has vigorously contributed to the regularization of thousands of businesses that in the absence of the benefits afforded by the new law would have remained in complete informality. It has also allowed for local and national governments to collect millions of dollars in taxes. At the same time, it has fostered an exponential growth in franchise fees charged by mercantile registries all over the country. Social security contributions as well as other payments to governmental agencies have also boosted within the last five years thanks to this new type of business entity. Furthermore, several accounting, legal and managing services have also flourished along the new business realities that the SAS has brought about. Even more significant still is the impact that this new form has had in the creation of new jobs. Statistical analysis suggests that the unemployment rate may have gone down after the introduction of this new type of business entity. According to statistical analysis rendered by the National Office of Corporations (*Superintendencia de Sociedades*), at least two and a half million people all over the country are employed through the existing SAS.<sup>4</sup>

3. The SAS has displaced all traditional business forms that existed during the 1971 Colombian Commercial Code rule.<sup>5</sup> Today these outdated forms represent less than 4 per cent of the total amount of business entities that file articles of association before the country's 52 Mercantile Registries. Not surprisingly, the remaining 96,6 per cent of the new incorporations corresponds to the formation of new Simplified Corporations. This is probably due to the formalistic nature of the previous regulation and the SAS' reduced transaction costs, simplified structure and contractual flexibility. Moreover, the new type of entity has sparked legal innovation and fostered new business structures that were difficult to design in the recent past, given the rigidities of the Commercial Code regulation.

4. The Colombian SAS legislation is a simple but comprehensive legal system that governs relationships between shareholders and other corporate participants and outsiders, and also between the participants themselves. It is endowed with legal personality, investors ownership and full-fledged limited liability. All these features are available to corporate participants at the outset through an expeditious incorporation system. Concerning the relationships with outsiders, the law provides a system of exceptional shareholder liability through the application of the disregard of the legal entity theory, although restricted to the events of abuse or fraud.

5. Law 1258 of 2008 also aimed at curtailing opportunistic behaviour by controlling shareholders, directors and officers. By replacing *ex ante* directory rules by *ex post* legal standards, it has allowed for a more nuanced scrutiny of the insiders' activities. Standards such as good faith and fiduciary duties of directors and officers (also applicable to controlling shareholders) are intended to promote honest behaviour in the day-to-day affairs of the corporation. In order to make these new standards workable an innovative enforcement system has been put in place. A highly sophisticated Corporate Law court in which final judgments are obtained in an average term of four months has replaced a corrupt and inefficient judicial system in which protracted litigation was the dominant feature.

6. Within this advanced legal framework it is expected that the usually high consumption of private benefits of control by majority shareholders will decrease overtime. This qualitative change would allow for a more reasonable allocation of economic benefits among all the shareholders. Likewise it is expected that in the next future minority shareholders will be able to profit from the controlling shareholders'

<sup>4</sup> Report rendered by the Deputy Superintendent for Economic Studies, Bogotá, September 2013.

<sup>5</sup> Those types of entities were: (1) The General Partnership (*Sociedad Colectiva*), (2) The Corporation (*Sociedad Anónima*), (3) The Limited Liability Company (*Sociedad de Responsabilidad Limitada*), (4) The Limited Partnership by Quotas (*Sociedad en Comandita Simple*), and (5) The Limited Partnership by Stocks (*Sociedad en Comandita por Acciones*).

monitoring and managerial efforts without being exposed to the exponential risk of expropriation. In this manner, the conceivable distributional effects that may stem out of a more flexible regulatory business environment will be timely hampered by the efficient application of the above-mentioned standards.

7. The starting point for the Simplified Corporation's original proposal was the idea of facilitating the formalization of business entities and updating the legal system in order to introduce forward-looking approaches to Corporate Law. For that purpose, a thorough critical revision of the previous Company Law framework was required. This analysis was made under a functional Comparative Law methodology along with the application of relevant notions of Economic Analysis of Law. As expected, the results of such evaluation revealed the inadequacy of most Company Law provisions in place and the need to carry out an overhaul of both the legal and the institutional frameworks.<sup>6</sup>

8. Soon after the law was passed, the business community reacted eagerly to the new legal realities. The SAS has not only changed the manner in which people do business in Colombia, but it can also be credited for a significant change in the legal culture. This new type of business association has fostered additional legal reforms to other traditional institutions that were still present in old codes and statutes in Colombia.<sup>7</sup> Surprisingly, until 2008 legal scholars found these outdated laws appropriate for the local business environment, and had unanimously hailed this antiquated legislation. Only after the SAS revolution, there is increasing awareness concerning the need to revise anachronistic legal institutions that still today hinder commerce and represent an obstacle to economic development.

9. Law 1258 of 2008 also represents a step forward in legislative technique. Although the SAS law is linked to the preceding general Corporation Laws, the application of any rule contained in these traditional norms takes place exceptionally and only to fill gaps where the parties have not made a specific provision in the by-laws. In fact, the SAS law contains general housekeeping rules that operate as default provisions, and are particularly useful for those parties who lack the expertise, time or resources needed to negotiate tailor made corporate contracts and shareholders agreements. To this effect, the Colombian Mercantile Registry offices have designed and implemented model by-laws that are extensively used by SMEs all over the country. In this manner entrepreneurs can significantly reduce transaction costs and proceed to the incorporation without the aid of costly advisors.<sup>8</sup>

10. Naturally, the SAS' opt in approach also allows for private parties to step out of the standard provisions contained in model by laws and to draft sophisticated agreements that are appropriate for more complex undertakings. The enabling non-directory provisions of Law 1258 have fostered private ordering and sparked innovation in Corporate Law across the country. Aside from the boilerplate type of agreements that are used by most start-ups, practicing attorneys are becoming skilful at developing new legal structures suitable for a more sophisticated business environment.

11. The Colombian SAS has represented a substantial improvement in reducing transaction costs and providing contractual flexibility to business parties. In accordance with this approach, Law 1258 of 2008 requires formalities to be applied only with regard to those matters that have a functional effect on the marketplace. It also promotes private ordering, fosters the drafting of innovative shareholders agreements, and facilitates corporate capitalization through the issuance of all types of securities.

12. This new type of business entity is also intended to dramatically alter the inefficient enforcement landscape by aiding to the development of a specialized

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<sup>6</sup> See Francisco Reyes, *Latin American Company Law, Reshaping the Closely Held Entity Landscape*, Durham, Carolina Academic Press, 2013.

<sup>7</sup> For instance, Law 1429 of 2010 introduced substantial changes to the processes of dissolution and liquidation of corporations. Following the trend initiated with the SAS, this new law reduced unnecessary formalities and created hasty proceedings to wind up a business corporation.

<sup>8</sup> See, for instance: [www.ccb.org.co](http://www.ccb.org.co).

jurisdiction in which matters are rapidly resolved by proficient and honest judges. The deterring effect of decisions rendered by this jurisdiction in a short period of time has impacted the business community in an unprecedented manner. Knowing that justice will be on the side of those who play by rules, and that wrongdoers will be rapidly punished is signalling that Corporate Governance devices work at least in the context of closely held corporations. It remains to be seen, however, if in the long run this enforcement system will have a direct impact on the cost of capital.

13. Five years after the enactment of Law 1258 of 2008, the success of the Simplified Corporation has surpassed any expectation. The empirically measured success of the Colombian SAS in both the legal and business environment can be attributed to the friendly simplified nature of the substantive provisions that govern its incorporation and operation, and to the efficient results of the specialized jurisdiction that was put in place right after the SAS legislation was enacted.

14. The Colombian SAS can very well become an export product. It is a blend of Common Law and Civil Law approaches to Business Associations. Instead of adhering to dogma or established tradition it reflects the economic needs of common business people and successfully offers clear and sensible solutions to reduce entry barriers, ameliorate organizational problems and provide expedited dispute resolution mechanisms. This legislation is also an attempt to deal with agency problems that are common in most countries without taking into account each jurisdiction's ownership pattern. For this reason, the Organization of American States' Legal Committee has recommended the adoption of a Model Act on Simplified Corporations for all the countries in the Americas on the grounds that it represents a "very credible case in favour of legislative reforms to permit such innovative business forms" to promote economic growth.<sup>9</sup>

## II. The Model Act on Simplified Corporations

15. Although the Simplified Corporation derives its name from the French *Société par Actions Simplifiée*, this entity closely resembles the hybrid business entities that have been set in place in the United States and the United Kingdom during the last several years. The proposed business entity is intended to allow for significant contractual flexibility, while still preserving the benefits of limited liability and asset partitioning. The basic framework for the SAS's Model Act is based upon the following five pillars: (i) Full-fledged limited liability; (ii) Simple incorporation requirements; (iii) Contractual flexibility; (iv) Simple organizational structure; and (v) Fiscal transparency.<sup>10</sup>

16. The Model Act on Simplified Stock Corporations — crafted after the Colombian example — is not intended to serve as a partial amendment to be introduced to traditional business forms regulated in national codes and statutes.<sup>11</sup> Instead, it is recommended that its enactment take place on a separate legislation that could be linked to the existing system.<sup>12</sup> In this manner, the SAS should have to compete with other types of business forms.

### 1. Flexibility to regulate shareholder relationships

17. Under the simplified stock corporation model, shareholders acquire broad flexibility to freely regulate their relationships pursuant to a set of enabling provisions containing off-the-rack housekeeping rules that parties can opt out of and replace for

<sup>9</sup> See David P. Stewart, *Recommendations on the Proposed Model Act on the Simplified corporation*, OAS, 79th Regular Session, August 2011. Francisco Reyes Villamizar prepared the OAS Legal Committee's Model Act. It was crafted after the Colombian Law 1258.

<sup>10</sup> See Model Act on the Simplified Stock Corporations, et seq., *infra* Annex.

<sup>11</sup> Such as Commercial Codes and Corporate Law statutes existing in different countries in this region.

<sup>12</sup> See Joseph A. McCahery and Eric P.M. Vermeulen, McCahery, Joseph A., Vermeulen, Erik P. M., Hisatake, Masato and Saito, Jun, *The New Company Law — What Matters in an Innovative Economy?* (September 2006). ECGI — Law Working Paper No. 75/2006 at 20.

tailor-made provisions, if needed.<sup>13</sup> Therefore, shareholder protection can be achieved through devices of a contractual nature. In this manner, the antagonism between majority and minority shareholders may be ameliorated through *ex ante* negotiations. Agency costs can also be reduced as shareholders are able to satisfy their contracting interests, by setting up specific provisions on the corporate documents. For this purpose, the model act not only proposes enabling provisions, but also enhances the enforceability of shareholders' agreements. Through the latter device, it is possible to reach certain equilibrium between stockholders by means of sophisticated mechanisms in which rights and obligations can be crafted to carefully determine *a priori* expectations of all corporate participants. Therefore, clauses setting up drag along or tag along rights, put and call options and buy out agreements can be included in shareholders agreements. Following the incomplete contracts theory, this enhanced freedom of contract complemented by gap-filling through an efficient adjudication process is intended to provide an improved conflict-resolution scenario for shareholders.<sup>14</sup>

## 2. Introduction of specific performance

18. In accordance with the theory of *structural transplants*,<sup>15</sup> the remedy of specific performance is introduced to allow for the adequate enforcement of these agreements in the event of default. Furthermore, the model act incorporates a comprehensive regulation on the *abus de droit* (abuse of rights) theory, which is extrapolated from the French jurisprudence on Corporate Law.<sup>16</sup>

19. Under this theory, shareholders have the ability to bring judicial actions or arbitration complaints, not only on the grounds of abuses of controlling shareholders, but also concerning the same conduct where it has been deployed by minority shareholders, and also in the event of an abuse in symmetrical block shareholdings (i.e., dual ownership on a 50 per cent-50 per cent distribution).<sup>17</sup> The abuse of right action may give rise to damages for the aggrieved party, as well as rescission of the abusive act. Fiduciary duties of care and loyalty can also be applicable to the officers and directors of the SAS. To complete the scenario of corporate law protections, the model act allows for the application of the shadow director doctrine, by means of which any person who intrudes in a positive management activity, without being a legally appointed manager or director, can be disciplined under fiduciary duties as if she were acting in such managerial capacity.<sup>18</sup>

<sup>13</sup> See e.g., Model Act on the Simplified Stock Corporations, §17, *infra* Annex (stating that "Shareholders may freely organize the structure and operation of a simplified stock corporation in the by-laws. In the absence of specific provisions to this effect, the shareholders' assembly or the sole shareholder, as the case may be, will be entitled to exercise all powers legally granted to the shareholders' assemblies of stock corporations, whilst the management and representation of the simplified stock corporation shall be granted to the legal representative").

<sup>14</sup> See William Bratton et al., *Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross-Reference*, 38 Colum. J. Transnat'l L., 273-74 (1999).

<sup>15</sup> Such a concept implies that it is not sufficient for the importation of a rule to merely incorporate into the borrowing country the substantive principles or provisions that work properly in the foreign lending jurisdiction. Along with such substantive norms it is also necessary to incorporate the rules (procedural or otherwise) and factors that cause such provisions to operate properly, including all circumstances that determine its efficiency and enforceability. See Katharina Pistor et al., "Fiduciary Duty in Transitional Civil Law Jurisdictions", in *Global Markets. Domestic Institutions. Corporate Law and Governance in a New Era of Cross-Border Deals*, New York, Columbia University Press, 2003, at 77-106.

<sup>16</sup> Alexis Constantin, *Droit des Sociétés, Droit común et droit spécial des sociétés*, 2<sup>a</sup> edición, Paris, Dalloz, 2005, at 85.

<sup>17</sup> *Id.*

<sup>18</sup> See Model Act on the Simplified Stock Corporations, § 27, 1, *infra* Annex ("Any individual or legal entity who is not a manager or director of a simplified stock corporation that engages in any trade or activity related to the management, direction or operation of such corporation shall be subject to the same liabilities applicable to directors and officers of the corporation.")

### 3. Piercing the corporate veil to extend liability to controlling shareholder

20. Even if limited liability is one of the main features of the SAS, the Model Act provides for piercing the corporate veil in order to extend liability to controlling shareholders in the event of fraud or abuse.<sup>19</sup> Such a procedure has to be brought before a specialized jurisdiction or an arbitration panel that will guarantee a more technical and expedited resolution for aggrieved creditors, as compared to the ordinary systems of adjudication which are handled before civil courts.<sup>20</sup>

21. The SAS is as useful for local businessmen as it is for foreign investors. The Model Act seeks to remedy the legislative void existing throughout the region concerning hybrid business forms, as well as reducing transaction costs and providing entrepreneurs with enough flexibility to allow for private ordering in a multi-functional business form, suitable for all kinds of undertakings.<sup>21</sup>

### 4. Specific aspects of the SAS Model Act

22. The enabling nature of most of the SAS provisions is particularly relevant, due to the parties' ability to freely draft any clauses that may allow them to neutralize the sort of agency problems that usually characterize non-listed firms.<sup>22</sup> By exercising this significant contractual freedom, shareholders can stay away from standardized corporate contracts. In this manner, creativity and innovation concerning new corporate structures may be fostered.

#### (a) Nature and legal personality

23. In the first place, the SAS is a business entity that may be created either by the execution of a contract or through the subscription of an incorporation document by the sole shareholder.<sup>23</sup> This feature is intended to provide investors with a high level of flexibility. The business entity is suitable either for the formation of small, single member corporations or large, multi-owner enterprises including entities forming part of corporate groups. The SAS can be used in any venture, irrespective of the number of shareholders that concur to incorporate it or who subscribe shares at a subsequent stage.<sup>24</sup> In fact, neither the entrance nor the exit of stockholders can affect the continuity of the corporate entity, as long as one person remains as a shareholder. In this way, the antiquated rules setting forth minimum and maximum numbers of shareholders are surpassed completely.

24. The legal personification of the SAS is produced once the document of incorporation (private or public deed) is filed before the Mercantile Registry. Registration of the simplified corporation has a "constitutive" nature, since it determines the regularity of the business association, the benefits arising from asset partitioning, and limited liability. The SAS designed to be registered online. Therefore, notarizations and other annoying formalities are altogether surpassed in the SAS scheme.

25. It is necessary to emphasize that the SAS is not conceived to be listed in a stock market. The SAS is a business association type designed to structure closely-held companies. The broad contractual flexibility that allows providing for rules

<sup>19</sup> See Model Act on the Simplified Stock Corporations, § 41, *infra* Annex ("The corporate veil may be pierced whenever the simplified stock corporation is used for the purpose of committing fraud. Accordingly, joint and several liability may be imposed upon shareholders, directors and managers in case of fraud or any other wrongful act perpetrated in the name of the corporation.")

<sup>20</sup> See Colombian Law 1258 of 2008, article 40, regarding arbitration and specialized procedures for the Simplified Stock Corporation of Colombia.

<sup>21</sup> For example, Model Act on the Simplified Stock Corporations, § 5, 5 allows for incorporators to state in the entity's by laws that corporation may engage in any lawful business, unless a restricted purpose has been set forth by the parties.

<sup>22</sup> See, for example, Model Act on the Simplified Stock Corporations, § 5, 7, according to which, the parties enjoy considerable leeway to stipulate any provisions for the management of the business and for the conduct of its affairs, provided that at least one legal representative is appointed to conduct the affairs of the corporation in relation with third parties.

<sup>23</sup> See Model Act on the Simplified Stock Corporations, § 5, *infra* Annex.

<sup>24</sup> *Id.*

concerning the squeeze out of shareholders, stocks with multiple voting rights, severe restrictions on stock transfers, among others, may be incompatible with the investor protection guidelines that are mandated for listed companies. For the same reasons, the French SAS statute does not allow the possibility of raising resources originating from private savings in the stock market (*appellation publique à l'épargne*).<sup>25</sup>

**(b) Incorporation and proof of existence**

26. The Model Act indicates how the SAS may arise out of a contract or a unilateral act.<sup>26</sup> This approach is intended to supersede the old-fashioned discussion, so frequent in Latin America and even in Continental European countries, concerning the so-called one-person corporation. This significant improvement is immensely useful for structuring corporate groups where total corporate control may be centralized in a single parent corporation.

27. Among other things, the Model Act intends to reduce administrative and bureaucratic procedures and formalities necessary for the incorporation of a company. The corresponding provisions are aimed at reducing entry barriers in order to facilitate the creation of new businesses and mitigate the impact of transaction costs.<sup>27</sup> Accordingly, the required procedure to set up a SAS has been reduced to the filing of the formation document in the country's mercantile registry. Section 5 of the Model Act states that, a simplified stock corporation "will be formed by contract or by the individual will of a single shareholder, provided that a written document is granted."<sup>28</sup> Pursuant to the same provision, the formation document "shall be registered before the Mercantile Registry."<sup>29</sup>

28. The SAS Model Act authorizes the parties to set up an unrestricted corporate purpose.<sup>30</sup> This approach is found to be more convenient due to efficiency considerations. Such a characteristic determines a meaningful difference in the economic conception of the stock corporation. Within the unrestricted purpose clause system, managers obtain a higher degree of discretionary authority to run the corporation. There is no need to amend the corporation's by-laws every time that a new, different business opportunity arises.

29. It is true that broadening the scope of business activities that the corporation can carry on ameliorates the impact of the ultra vires theory which has permeated most Latin American jurisdictions. Indeed, the traditional "specialty theory", by means of which the partners have to define *ex* restricted objects in the foundational documents, has also led to complicated and protracted litigation. The corollary of such specialty theory is closely linked with "ultra vires" concerns, for any act beyond the corporation's objects is deemed to be null and void. This legal consequence arises from the lack of legal capacity to undertake any activity beyond the purpose clause. As it is obvious within the SAS, parties can opt out this default provision and set up a restricted purpose clause in the corporate by-laws, defining the specific corporation's main economic activities that, in turn, will determine the entity's legal capacity.<sup>31</sup>

**(c) Capital contributions and shares**

30. One of the most relevant aspects of the new statute has to do with the great flexibility afforded to entrepreneurs that intend to make cash contributions to the firm. The SAS can be funded through a variety of channels, which surpass even the financing mechanisms available for traditional stock corporations. Even if the SAS cannot undertake public issuances of shares due to its nature as an archetypical

<sup>25</sup> See Dominique Vidal, *Droit des Sociétés* 585 (Paris, L.G.D.J. 2006) (Original date of publication).

<sup>26</sup> See Model Act on the Simplified Stock Corporations, § 5 & 6, *infra* Annex.

<sup>27</sup> *Id.*

<sup>28</sup> See *id.*

<sup>29</sup> *Id.*

<sup>30</sup> The paper suggests "any lawful purpose", see Model Act on the Simplified Stock Corporations, § 5, 5, *infra* Annex.

<sup>31</sup> See Model Act on the Simplified Stock Corporations, § 5, 5, *infra* Annex.

closely-held entity, the flexibility of its capital structure facilitates the process of raising resources from private actors.

31. Section 9 of the SAS Model Act allows entrepreneurs to freely allocate numerical values to the firm's authorized, subscribed, and paid-in capital.<sup>32</sup> Furthermore, it allows for payment of the firm's subscribed capital to take place up to two years after the shares have been initially subscribed.<sup>33</sup> Firms can also issue classes of shares with varying rights.<sup>34</sup> Section 9 allows for capital subscription and payment to be carried out under "terms and conditions different to those set forth under the Commercial Code."<sup>35</sup> Under Section 10 of the SAS Model Act, firms can also issue "preferred shares with or without vote". This opens up myriad possibilities for entrepreneurs, who have traditionally been unable to freely determine the rights carried by shares that are issued in closely held firms.<sup>36</sup>

32. In granting ample flexibility for firms to issue different classes of shares, the SAS Model Act not only favours capital-raising processes but perhaps more importantly, facilitates the administration of corporate affairs by entrepreneurs.

**(d) Company organization**

33. Simplifying the operation and organic structure is an important goal of hybrid business forms. Attaining such a goal ameliorates the costs associated with the company's operation. Accordingly, one of the principal aspects of the SAS legal regime is the creation of a flexible regime, which allows entrepreneurs to opt out of otherwise mandatory provisions.<sup>37</sup> The enabling character of this regulation also gives way to an enormous freedom of organization for the shareholders. Périn holds that within the regulation of the French Simplified Stock Corporation the combination of freedom of contract with the elements of stock corporations constitutes an unprecedented privilege in that country's legal system.<sup>38</sup> For any economic agent, the election of the SAS as a business structure corresponds to the desire of increasing the organization's efficiency by making it suitable to shareholders' necessities.<sup>39</sup>

34. The SAS Model Act confers entrepreneurs with complete freedom over the company's internal organization structure. This is meant to lighten the firm's bureaucratic burden by reducing to a minimum its mandatory organs. Section 17 of the Model Act establishes in a very clear fashion that the SAS's structure may be freely defined in its by-laws, to wit: "Shareholders may freely organize the structure and operation of a simplified stock corporation in the by-laws."<sup>40</sup> In the absence of specific by-law provisions, "the shareholders' assembly or the sole shareholder, as the case may be, will be entitled to exercise all powers legally granted to the shareholders' assemblies of stock corporations, whilst the management and representation of the simplified stock corporation shall be granted to the legal representative."<sup>41</sup>

35. In this manner, the SAS's shareholders' assembly maintains a preponderant role that is reflected in the great variety of powers attributed to it. Therefore, most significant corporate transactions must be authorized by the shareholders duly gathered in the assembly or by the sole shareholder. Specifically, the Model Act, in its Section 37, confers upon the assembly the power to consider and approve the "financial statements and annual accounts" of the company.<sup>42</sup> These documents must be submitted to the business entity's highest organ by the corporation's legal representative before the corresponding shareholders' assembly meeting. The same

<sup>32</sup> See Model Act on the Simplified Stock Corporation, § 9, *infra* Annex.

<sup>33</sup> *Id.*

<sup>34</sup> See Model Act on the Simplified Stock Corporation, § 10, *infra* Annex.

<sup>35</sup> See Model Act on the Simplified Stock Corporation, § 9, *infra* Annex.

<sup>36</sup> See Model Act on the Simplified Stock Corporation, § 10, *infra* Annex.

<sup>37</sup> See Model Act on the Simplified Stock Corporation, § 5, *infra* Annex.

<sup>38</sup> Pierre-Louis Périn, *La Société par Actions Simplifiée: Etudes-Formules* 11 (Joly Editions 3rd ed. 2008).

<sup>39</sup> *Id.*

<sup>40</sup> See Model Act on the Simplified Stock Corporation, § 17, *infra* Annex.

<sup>41</sup> *Id.*

<sup>42</sup> See Model Act on the Simplified Stock Corporation, § 37, *infra* Annex.

Section adds that when dealing with corporations with a single shareholder, she will approve all the company's accounts and will leave a record of such approval in the company minutes dutifully filed in the corporate books.<sup>43</sup>

36. The by-laws may also create other organs such as the board of directors to carry on part of the activities usually performed by the assembly.

37. As the corporation's main governing body, the assembly draws the firm's policies, adopts structural decisions (conversions, mergers, split-up, winding up, etc.), approves financial statements, distributes profits and creates reserves.<sup>44</sup> As it is the general approach in the Model Act, the cited part of Section 17 is in part a default rule, subject to the parties' will. Therefore, it is viable to allocate some of the corporate powers assigned to the assembly in a different fashion.

**(e) Meetings of the shareholders' assembly**

38. The rules for the operation of the shareholders' assembly also contain meaningful modifications to traditional approaches, as once again the Model Act aspires to decrease unnecessary formalism. To this effect, the proposed changes simplify the existing rules for calling meetings of shareholders, as well as the provisions that govern quorum, majorities, actions without a meeting, etc. This is a very significant change since it removes a series of requirements based on old-fashioned standards, which traditionally paved the road for innumerable lawsuits originating in these purely formalistic aspects.

39. In order to facilitate the decision making processes in the SAS, and bearing in mind that it is a useful instrument for foreign investment, the Model Act allows shareholders' assemblies to meet at any specific location, irrespective of its main domicile.<sup>45</sup> Another manner in which the Model Act seeks to facilitate the operation of shareholders' meetings is through the creation of alternative mechanisms for the adoption of decisions and the simplification of existing mechanisms for this same purpose.<sup>46</sup> In any event, due to the fact that these rules are enabling rather than mandatory, it will always be possible to stipulate different requirements for actions without a meeting to be effectuated.<sup>47</sup> Regarding notice of meetings, the parties can set up alternative mechanisms and define, within reasonable limits, the term between the delivery of such notice and the date when the meeting will be held. Section 19 of the cited Act allows for meetings "through any available technological devices or by written consent."<sup>48</sup> A provision like this clearly foresees the applicability of any available technological means of communication. The utilization of these devices will only increase through time, as local economies and jurisdictions become more integrated and intertwined. The SAS Model Act also allows for the shareholders to define in the by-laws the corporate organ that will be entitled to formulate the respective notice.<sup>49</sup>

40. The mechanism regarding the waiver of notice to shareholders' meeting constitutes a great innovation in the simplified stock corporation. Under the general regime, omitting the notice of meeting or formulating it inadequately has the potential to disrupt the firm's internal affairs. In practice, the shareholders of a closely held corporation (which are often member of the same family) will not observe the full formalities required for calling meeting of the shareholders' assembly. However, this will not have any adverse effects for the shareholders, as they will in practice have full knowledge of the dealings undertaken in the assembly. Accordingly, it is

<sup>43</sup> *Id.*

<sup>44</sup> See Model Act on the Simplified Stock Corporation, § 20, *infra* Annex.

<sup>45</sup> See Model Act on the Simplified Stock Corporation, § 18, *infra* Annex.

<sup>46</sup> See Model Act on the Simplified Stock Corporation, § 19, *infra* Annex.

<sup>47</sup> See Claude Penhoat, *Droit des Sociétés* 303 (AENGDE 5th ed. 1998). Claude Penhoat suggests diverse forms of deliberations within the French SAS structure, including vote cast directly by shareholders who attend the meeting, vote by correspondence, vote by proxy, and any other technique. The same author adds that, quorum and majority conditions are freely defined in the by-laws, except for some decisions requiring unanimity. *Id.*

<sup>48</sup> See Model Act on the Simplified Stock Corporation, § 19, *infra* Annex.

<sup>49</sup> See Model Act on the Simplified Stock Corporation, § 20, *infra* Annex.



reasonable to allow them to validate the formerly incurable breach of the formalities for calling meetings of shareholders, through the waiver of notice mechanism. So, if for example, after an assembly meeting in which there was sufficient quorum (though not a universal one) and decisions were taken with the proper majorities, it was established that the absentees shareholders were not dutifully called, this breach in the formalities for calling the meeting can be cured through a simple letter addressed to the corporation's legal representative. For this effect, the only requirement needed is the submission of a written document to the company before, during, or after the corresponding session.

41. In the same path of creating a more effective and balanced regime for the SAS than the one that exists for other business forms, the Model Act proposes the creation of an implicit validation system for assembly decisions in cases where the notice of meeting given to all or some of the shareholders present at the assembly has been irregular or non-existent.<sup>50</sup> In fact, even if they were not summoned to the assembly, the law presumes that those shareholders attending the corresponding meeting have waived their right of notice. Nevertheless, Section 21 of the SAS Model Act allows present shareholders to demand an appropriate advance notice before the meeting takes place.<sup>51</sup> The provision states that "the attendees in a given shareholders' assembly will be deemed to have waived the right of being convened, unless such shareholders make a statement to the contrary before the meeting takes place."<sup>52</sup>

42. In summary, the rigidity of the current regulations in Latin American jurisdictions is attenuated in this subject matter by the introduction of innovative legal rules facilitating shareholders effective communication and, furthermore, by allowing entrepreneurs to dispense with unnecessary nullifications and other legal sanctions when no damage exists because of such omission.

### III. Conclusion

43. The Colombian SAS legislation has proven to be an appropriate framework for the operation of all types of closely held corporations. The law that gave rise to this business entity was the result of a combination of Common Law and Civil Law types of modern business corporations. Five years after the enactment of Colombian Law 1258 of 2008 it seems clear that it is possible to achieve high impact changes from a relatively simple reform of outdated Corporate Law provisions.

44. The incorporation of more than 200,000 Simplified Stock Corporations during the first five years following the enactment of this law eloquently shows the usefulness of new corporate vehicles endowed with flexibility and simplified incorporation features. Through the SAS Colombia has achieved higher levels of economic formalization, access to credit and investment, increased collection of taxes, and the creation of new jobs.

45. The SAS experiment may be beneficial in other countries if appropriately transplanted. It could be particularly useful in developing and emerging economies where there is an increasing need for flexible and user-friendly corporate vehicles. The success of the SAS clearly suggests that businesspeople prefer flexibility to old-fashioned, misguided paternalism.

46. Welfare enhancement reforms such as the introduction of the Simplified Corporation would require, however, breaking up path dependence and overcoming certain pressure groups and backward looking legal traditions. For this purpose it would be extremely useful to prepare and promote a model act on Simplified Corporations. An instrument such as this could serve as a starting point in legislative processes for the amendment of Corporate Laws in several countries.

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<sup>50</sup> See Model Act on the Simplified Stock Corporation, § 21, *infra* Annex.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

## Annex

### Model Act on the Simplified Corporation (MASSC)

#### Chapter I

##### General Provisions

**Section 1. Nature.** — The simplified corporation is a for profit legal entity by shares, the nature of which will always be commercial irrespective of the activities set forth in its purpose clause.

**Section 2. Limited Liability.** — The simplified corporation may be formed by one or more persons or legal entities.

Shareholders will only be responsible for providing the capital contributions promised to the simplified corporation.

Except as set forth in Section 41 of this Act, shareholders will not be held liable for any obligations incurred by the simplified corporation, including, but not limited to, labour and tax obligations.

There shall be no labour relationship between a simplified corporation and its shareholders, unless an explicit has been executed to that effect.

**Section 3. Legal Personality.** — Upon the filing of the formation document before the *Mercantile Registry* [include the name of corresponding company registrar's office], the simplified corporation will form a legal entity separate and distinct from its shareholders.

**Section 4. Inability to Become a Listed Entity.** — The shares of stock and other securities issued by a simplified corporation shall neither be registered within a stock exchange, nor traded in any securities market.

#### Chapter II

##### Formation and Proof of Existence

**Section 5. Contents of the Formation Document.** — A simplified corporation will be formed by contract or by the individual will of a single shareholder, provided that a written document is granted. The formation document shall be registered before the *Mercantile Registry* [include the name of corresponding company registrar's office], and shall set forth:

- (1) Name and address of each shareholder;
- (2) The name of the corporation followed by the words "simplified corporation" or the abbreviation "S.A.S.";
- (3) The corporation's domicile;
- (4) If the simplified corporation is to have a specific date of dissolution, the date in which the corporation is to dissolve;
- (5) A clear and complete description of the main business activities to be included within the purpose clause, unless it is stated that the corporation may engage in any lawful business;
- (6) The authorized, subscribed and paid-in capital, along with the number of shares to be issued, the different classes of shares, their par value, and the terms and conditions in which the payment will be made;
- (7) Any provisions for the management of the business and for the conduct of the affairs of the corporation, along with the names and powers of each manager. A simplified corporation shall have at least one legal representative in charge of managing the affairs of the corporation in relation with third parties.

No additional formalities of any nature shall be required for the formation of the simplified corporation.

**Section 6. Attestation.** — The *Mercantile Registrar* [include the name of corresponding company registrar's office] shall attest to the legality of the provisions set forth in the formation document and any amendments thereof.

The Registrar shall only deny registration where the requirements provided under Section 5 have not been met. The decision rendered by the Registrar shall be issued within three days after the relevant filing has been made. Any decision denying registration will only be subject to a rehearing conducted by the Registrar.

Upon the approval of a formation document by the Mercantile Registrar, challenges will not be heard against the existence of the simplified corporation and the contents of the formation document will constitute the simplified corporation's by-laws.

**Section 7. Assimilation to Partnership.** — Where a formation document has not been duly approved by the *Mercantile Registrar* [include the name of corresponding company registrar's office], the purported corporation will be assimilated to a partnership. Accordingly, partners will be jointly and severally liable for all obligations in which the partnership is engaged. If the partnership has only one member, such member will be held liable for all obligations in which the partnership is engaged.

**Section 8. Proof of Existence.** The certificate issued by the *Mercantile Registrar* [include the name of corresponding company registrar's office] is conclusive evidence as regards the existence of the simplified corporation and the provisions set forth in the formation document.

## Chapter III

### Special Rules Regarding Subscribed, Paid-in Capital and Shares of Stock

**Section 9. Capital Subscription and Payment.** — Capital subscription and payment may be carried out under terms and conditions different to those set forth under the *Commercial Code or corporate statute* [include the name of the relevant Code, Decree, Law or Statute]. In any event, payment of subscribed capital shall be made within a period of two years to be counted from the date in which the shares were subscribed. The rules for subscription and payment may be freely set forth in the by-laws.

**Section 10. Classes of Shares.** — The simplified corporation may issue different classes or series of shares, including preferred shares with or without vote. Shares may be issued for any consideration whatsoever, including in-kind contributions or in exchange for labour, pursuant to the terms and conditions contained in the by-laws.

Any special rights granted to the holders of any class or series of shares shall be described or affixed upon the back of the stock certificates.

**Section 11. Voting Rights.** — The by-laws shall depict in full detail the voting rights corresponding to each class of shares. Such document shall also determine whether each share will grant its holder single or multiple voting rights.

**Section 12. Share Transfers to a Trust.** — Any shares issued by a simplified corporation may be transferred to a trust provided that an annotation is made in the corporate ledger concerning the trustee company, the beneficial owners and the percentage of beneficial rights.

**Section 13. Limitation on the Transferability of Shares.** — The by-laws may contain a provision whereby the shares may not be transferred for a period not to exceed ten years, to be counted from the moment in which the shares were issued. Such term can only be extended by consent of all the holders of outstanding shares.

Any such limitation on share transferability shall be described or affixed upon the back of the stock certificate.

**Section 14. Authorization for the Transfer of Shares.** — The by-laws may contain provisions whereby any transfer of shares or of any given class of shares will be subject to the previous authorization of the shareholders' assembly, which shall be granted by majority vote or by any supermajority included in the by-laws.

**Section 15. Breach of Restrictions on Negotiation of Shares.** — Any transfer of shares carried out in a manner inconsistent with the rules set forth in the by-laws shall be null and void.

**Section 16. Change of Control in a Corporate Shareholder.** — The by-laws may impose upon an incorporated shareholder the duty to notify the simplified corporation's legal representative about any transaction that may cause a change in control regarding such shareholder.

Where a change in control has taken place, the shareholders' assembly, by majority decision, shall be entitled to exclude the corresponding incorporated shareholder.

Aside from the possibility of being excluded, any breach of the duty to inform changes in control may subject the concerned shareholder to a penalty consisting of a 20 per cent reduction of the fair market value of the shares, upon reimbursement.

In the event set forth in this article, all decisions concerning the exclusion of shareholders, as well as the determination of any penalties, shall require an approval rendered by the shareholders' assembly by majority vote. The votes of the concerned shareholder shall not be taken into account for the adoption of these decisions.

## Chapter IV

### Organization of the Simplified corporation

**Section 17. Organization.** — Shareholders may freely organize the structure and operation of a simplified corporation in the by-laws. In the absence of specific provisions to this effect, the shareholders' assembly or the sole shareholder, as the case may be, will be entitled to exercise all powers legally granted to the shareholders' assemblies of stock corporations, whilst the management and representation of the simplified corporation shall be granted to the legal representative.

Where the number of shareholders has been reduced to one, the subsisting shareholder shall be entitled to exercise the powers afforded to all existing corporate organs.

**Section 18. Meetings.** — Meetings of shareholders may be held at any place designated by the shareholders, whether it is the corporate domicile or not. For these meetings, the regular quorum provided in the by-laws will suffice, pursuant to Section 22 hereof.

**Section 19. Meetings by Technological Devices or by Written Consent.** — Meetings of shareholders may be held through any available technological device, or by written consent. The minutes of such meetings shall be drafted and included within the corporate records no later than 30 days after the meeting has taken place. These minutes shall be signed by the legal representative or, in her absence, by any shareholder that participated in the meeting.

**Section 20. Notice of Meeting.** — In the absence of stipulation to the contrary, the legal representative shall convene the shareholders' assembly by written notice addressed to each shareholder. Such notice shall be made at least five days in advance to the meeting. The agenda shall in all cases be included within any notice of meeting.

Whenever the shareholders' assembly is called upon to approve financial statements, the conversion of the corporation into another business form, or mergers or split-off proceedings, shareholders will be entitled to exercise information rights concerning any documents relevant to the proposed transaction. Information rights may be exercised during the five days prior to the meeting, unless a longer term has been provided for in the by-laws.

Any notice of meeting may determine the date in which the Second Call Meeting will take place, in case the quorum is insufficient to hold the first meeting. The date for the second meeting may not be held prior to ten days following the first meeting, nor after thirty days from that same moment.

**Section 21. Waiver of Notice.** — Shareholders may, at any moment, submit written waivers of notice whereby they forego their right to be convened to a meeting of the shareholders' assembly. Shareholders may also waive, in writing, any information rights granted under Section 20.

In any given shareholders assembly and even in the absence of a notice of meeting, the attendees will be deemed to have waived their right of being summoned, unless such shareholders make a statement to the contrary before the meeting takes place.

**Section 22. Quorum and Majorities.** — Unless otherwise specified in the by-laws, quorum to a shareholders' meeting will be constituted by a majority of shares, whether present in person or represented by proxy.

Decisions of the assembly shall be taken by the affirmative vote of the majority of shares present (in person or represented by proxy), unless the by-laws contain supermajority provisions.

The sole shareholder of a simplified corporation may adopt any and all decisions within the powers granted to the shareholders' assembly. The sole shareholder will keep a record of such decisions in the corporate books.

**Section 23. Vote Splitting.** — Shareholders may split their votes during cumulative voting proceedings for the election of directors or the members of any other corporate organ.

**Section 24. Shareholders' Agreements.** — Agreements entered into between shareholders concerning the acquisition or sale of shares, pre-emptive rights or rights of first refusal, the exercise of voting rights, voting by proxy, or any other valid matter, shall be binding upon the simplified corporation, provided that such agreements have been filed with the corporation's legal representative. Shareholders' agreements shall be valid for any period of time determined in the agreement, not exceeding 10 years, upon the terms and conditions stated therein. Such 10 year term may only be extended by unanimous consent.

Shareholders that have executed an agreement shall appoint a person who will represent them for the purposes of receiving information and providing it whenever it is requested. The simplified corporation legal representative may request, in writing, to such representative, clarification as regards any provision set forth in the agreement. The response shall be provided also in writing within the five days following the request.

**Subsection 1.** — The President of the shareholders' assembly, or of the concerned corporate organs, shall exclude any votes cast in a manner inconsistent with the terms set forth under a duly filed shareholders' agreement.

**Subsection 2.** — Pursuant to the conditions set forth in the agreement, any shareholder shall be entitled to demand, before a court with jurisdiction over the corporation, the specific performance of any obligation arising under such agreement.

**Section 25. Board of Directors.** — The simplified corporation is not required to have a board of directors, unless such board is mandated in the by-laws. In the absence of a provision requiring the operation of a board of directors, the legal representative appointed by the shareholders' assembly shall be entitled to exercise any and all powers concerning the management and legal representation of the simplified corporation.

If a board of directors has been included in the formation document, such board will be created with one or more directors, for each of whom an alternate director may also be appointed. All directors may be appointed either by majority vote, cumulative voting, or by any other mechanism set forth in the by-laws. The rules regarding the operation of the board of directors may be freely established in

the by-laws. In the absence of a specific provision on the by-laws, the board will be governed under the relevant statutory provisions.

**Section 26. Legal Representation.** — The legal representation of the simplified corporation will be carried out by an individual or legal entity appointed in the manner provided in the by-laws. The legal representative may undertake and execute any and all acts and contracts included within the purpose clause, as well as those which are directly related to the operation and existence of the corporation.

The legal representative shall not be required to remain at the place where the business has its main domicile.

**Section 27. Liability of Directors and Managers.** — All *Commercial Code* [include the name of the relevant Code, Decree, Law or Statute] provisions relating to the liability of directors and managers may also be applicable to the legal representative, the board of directors, and the managers and officers of the simplified corporation, unless such provision is opted-out in the by-laws.

**Subsection 1.** — Any individual or legal entity who is not a manager or director of a simplified corporation that engages in any trade or activity related to the management, direction or operation of such corporation shall be subject to the same liabilities applicable to directors and officers of the corporation.

**Subsection 2.** — Whenever a simplified corporation or any of its managers or directors grants apparent authority to an individual or legal entity to the extent that it may be reasonably believed that such individual or legal entity has sufficient powers to represent the corporation, the company will be legally bound by any transaction entered into with third parties acting in good faith.

**Section 28. Auditing Organs.** — A simplified corporation shall not, in any case, be legally mandated to establish or provide for internal auditing organs [include the name of corresponding auditing entity, e.g., fiscal auditor, auditing committee, etc.].

## Chapter V

### By-Law Amendments and Corporate Restructurings

**Section 29. By-law Amendments.** — Amendments to the corporate by-laws shall be approved by majority vote. Decisions to this effect will be recorded in a private document to be filed with the *Mercantile Registry* [include the name of corresponding company registrar's office].

**Section 30. Corporate Restructurings.** — The statutory provisions governing conversion into another form, mergers and split-off proceedings for business associations will be applicable to the simplified corporation. Dissenters' rights and appraisal remedies shall also be applicable.

For the purpose of exercising dissenters' rights and appraisal remedies, a corporate restructuring will be considered detrimental to the economic interests of a shareholder, inter alia, whenever:

- (1) The dissenting shareholder's percentage in the subscribed paid-in capital of the simplified corporation has been reduced;
- (2) The corporation's equity value has been diminished, or
- (3) The free transferability of shares has been constrained

**Section 31. Conversion into another Business Form.** — Any existing business entity may be converted into a simplified corporation by unanimous decision rendered by the holders of all issued rights or shares in such business form. The decision to convert into a simplified corporation shall be registered before the *Mercantile Registry* [include the name of corresponding company registrar's office].

A simplified corporation may be converted into any other business form governed under the *Commercial Code* [include the name of the relevant Code, Decree, Law or

*Statute*] provided that unanimous decision is rendered by the holders of all issued and outstanding shares in the corporation.

**Section 32. Substantial Sale of Assets.** — Whenever a simplified corporation purports to sell or convey assets and liabilities amounting to 60 per cent or more of its equity value, such sale or conveyance will be considered to be a substantial sale of assets.

Substantial sales of assets shall require majority shareholder approval.

Whenever a substantial sale of assets is detrimental to the interests of one or more shareholders, it shall give rise to the application of dissenters' rights and appraisal remedies.

**Section 33. Short-form Merger.** — In any case in which at least 90 per cent of the outstanding shares of a simplified corporation is owned by another legal entity, such entity may absorb the simplified corporation by the sole decision of the boards of directors or legal representatives of all entities directly involved in the merger.

Short-form mergers may be executed by private document duly registered before the *Mercantile Registry* [include the name of corresponding company registrar's office].

## Chapter VI

### Dissolution and Winding Up

**Section 34. Dissolution and Winding Up.** — The simplified corporation shall be dissolved and wound up whenever:

- (1) An expiration date has been included in the formation document and such term has elapsed, provided that a determination to extend it has not been approved by the shareholders, before or after such expiration has taken place;
- (2) For legal or other reasons, the corporation is absolutely unable to carry out the business activities provided under the purpose clause;
- (3) Compulsory liquidation proceedings have been initiated;
- (4) An event of dissolution set forth in the by-laws has taken place;
- (5) A majority shareholder decision has been rendered or such decision has been made by the will of the sole shareholder; and
- (6) A decision to that effect has been rendered by any authority with jurisdiction over the corporation.

Whenever the duration term has elapsed, the corporation shall be dissolved automatically. In all other cases, the decision to dissolve the simplified corporation shall be filed before the *Mercantile Registry* [include the name of corresponding company registrar's office].

**Section 35. Curing Events of Dissolution.** — Events of dissolution may be cured by adopting any and all measures available to that effect, provided that such measures are adopted within one year, following the date in which the shareholders' assembly acknowledged the event of dissolution.

Events of dissolution consisting on the reduction of the minimum number of shareholders, partners or members in any business form governed under the *Commercial Code* [include the name of the relevant Code, Decree, Law or Statute] may be cured by conversion into a simplified corporation, provided that unanimous decision is rendered by the holders of all issued shares or rights, or by the will of the subsisting shareholder, partner or member.

**Section 36. Winding Up.** — The simplified corporation shall be wound up in accordance with the rules that govern such proceeding for stock corporations. The

legal representative shall act as liquidator, unless shareholders appoint any other person to wind up the company.

## Chapter VII

### Miscellaneous Provisions

**Section 37. Financial Statements.** — The legal representative shall submit financial statements and annual accounts to the shareholders' assembly for approval.

In the event that there is a single shareholder in a simplified corporation, such person shall approve all financial statements and annual accounts and will record such approvals in minutes within the corporate books.

**Section 38. Shareholder Exclusion.** — The by-laws may contain causes by virtue of which shareholders may be excluded from the simplified corporation. Excluded shareholders shall be entitled to receive a fair market value for their shares of stock.

Shareholder exclusion shall require majority shareholder approval, unless a different procedure has been laid down in the by-laws.

**Section 39. Conflict Resolution.** — Any conflict of any nature whatsoever, excluding criminal matters that arises between shareholders, managers or the corporation may be subject to arbitration proceedings or to any other alternative dispute resolution procedure. In the absence of arbitration, the same disputes will be resolved by (*include specialized judicial or quasi-judicial tribunal*).

The decisions rendered by the tribunal are final and shall not be subject to appeals before any court.

**Section 40. Special Provisions.** — The legal mechanisms set forth under Sections 13, 14, 38 and 39 may only be included, amended or suppressed from the by-laws by unanimous decision rendered by the holders of all issued and outstanding shares.

**Section 41. Piercing the Corporate Veil.** — The corporate veil may be pierced whenever the simplified corporation is used for the purpose of committing fraud. Accordingly, joint and several liabilities may be imposed upon shareholders, directors and managers in case of fraud or any other wrongful act perpetrated in the name of the corporation.

**Section 42. Abuse of Rights.** — Shareholders shall exercise their voting rights in the interest of the simplified corporation. Votes cast with the purpose of inflicting harm or damages upon other shareholders or the corporation or with the intent of unduly extracting private gains for personal benefit or for the benefit of a third party shall constitute an abuse of rights. Any shareholder who acts abusively may be held liable for all damages caused, irrespective of the judge's ability to set aside the decision rendered by the shareholders' assembly. A suit for damages and nullification may be brought in case of:

- (1) Abuse of majority;
- (2) Abuse of minority; and
- (3) Abusive deadlock caused by one faction under equal division of shares between two factions.

**Section 43. Cross-References.** — The simplified corporation shall be governed:

- (1) By this Law;
- (2) By the formation document, as amended from time to time; or
- (3) By statutory provisions contained in the *Commercial Code* [*include the name of the relevant Code, Decree, Law or Statute*] governing stock corporations.



**Promulgation.** — This Act shall be effective as of the date of its promulgation and it repeals any and all statutes, acts, codes, decrees, or provisions of any nature that are inconsistent with this Act.



## VII. FUTURE WORK

### A. Note by the Secretariat on planned and possible future work — part I

(A/CN.9/807)

[Original: English]

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### I. Introduction

#### A. Background

1. At its forty-sixth session, in 2013, the Commission agreed that it should reserve time for discussion of UNCITRAL's future work as a separate topic at each Commission session (A/68/17, para. 310).<sup>1</sup>
2. This Note has been prepared to enable the Commission's consideration of future work at this forty-seventh session. It considers all UNCITRAL's main activities, both legislative development and activities designed to support the effective implementation, use and understanding of UNCITRAL texts (see para. 7 below for references to documents that explain the activities concerned). This Note also covers mandated and possible future subject-areas.
3. When setting UNCITRAL's work programme for the forthcoming period, the Commission may wish to recall its decision at the forty-sixth session that it would normally plan for the period to the next Commission session, but that some longer-term indicative planning (for a three-to-five year period) may also be appropriate (A/68/17, para. 305).

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<sup>1</sup> The Commission may wish to recall that at its forty-fourth session, in 2011, it requested the Secretariat to prepare a note on strategic planning, with possible options and an assessment of their financial implications (Report of the Commission's Forty-fourth Session, Supplement No. 17 (A/66/17), para. 343). At its forty-fifth session, in 2012, the Commission considered the resulting note by the Secretariat ("A strategic direction for UNCITRAL", A/CN.9/752 and Add.1) submitted pursuant to that request, and agreed to consider and provide further guidance on UNCITRAL's strategic direction at its forty-sixth session, requesting the Secretariat to reserve sufficient time to allow for a detailed discussion at that time (A/67/17, para. 231).

4. The Commission may wish to have reference to the following documents, to which this Note also refers:

Background documents from Commission's forty-sixth session, available at [www.uncitral.org/uncitral/commission/sessions/46th.html](http://www.uncitral.org/uncitral/commission/sessions/46th.html), and including:

A/CN.9/774 — Planned and possible future work, Note by the Secretariat; and  
A/68/17 — Report of the Commission's forty-sixth session (notably, paras. 292-332).

Background documents from the Commission's forty-fifth session, available at [www.uncitral.org/uncitral/commission/sessions/45th.html](http://www.uncitral.org/uncitral/commission/sessions/45th.html), and including:

A/CN.9/752 and Add.1 — A strategic direction for UNCITRAL, Note by the Secretariat;

A/67/17 — Report of the Commission's forty-fifth session (notably, paras. 228-232).

Documents for the current Commission session, available at [www.uncitral.org/uncitral/commission/sessions/47th.html](http://www.uncitral.org/uncitral/commission/sessions/47th.html), and including:

A/CN.9/800 — Report of Working Group I (MSMEs) on the work of its twenty-second session (New York, 10-14 February 2014);

A/CN.9/794 — Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-ninth session;

A/CN.9/795 and A/CN.9/801 — Reports of Working Group III (Online Dispute Resolution) on the work of its twenty-eighth and twenty-ninth session;

A/CN.9/797 and A/CN.9/804 — Reports of Working Group IV (Electronic Commerce) on the work of its forty-eighth and forty-ninth sessions;

A/CN.9/798 and A/CN.9/803 — Reports of Working Group V (Insolvency Law) on the work of its forty-fourth and forty-fifth sessions;

A/CN.9/796 and A/CN.9/802 — Reports of Working Group VI (Security Interests) on the work of its twenty-fourth and twenty-fifth sessions;

A/CN.9/773 — Status of the conventions and model laws, Note by the Secretariat;

A/CN.9/818 — Technical assistance activities undertaken since the Commission's forty-fifth session and technical assistance resources, Note by the Secretariat, including UNCITRAL publications, the UNCITRAL website, and a survey of the activities undertaken by the UNCITRAL Regional Centre for Asia and the Pacific (RCAP) since the Commission's forty-fifth session;

A/CN.9/809 — Brief survey of the activities undertaken by the Secretariat since the Commission's forty-fifth session to ensure coordination with the work of other organizations active in the field of international trade law, Note by the Secretariat;

A/CN.9/810 — Status and progress of CLOUT, Note by the Secretariat (including updates on the current activities concerning digests);

A/CN.9/811 — Note by the Secretariat on security interests in non-intermediated securities);

A/CN.9/815 — Report of the UNCITRAL International Insolvency Law Colloquium (Vienna, 16-18 December 2013);

A/CN.9/819 — Possible future work in Public-Private Partnerships (PPPs) Discussion paper — Part I;

A/CN.9/820 — Possible future work in Public-Private Partnerships (PPPs) Discussion paper — Part II;

A/CN.9/821 — Report of an International Colloquium on Public-Private Partnerships (Vienna, 3-4 March 2014).

## II. Summary of current activities

### A. Legislative work

5. The table below sets out current legislative development, and the envisaged completion dates of the texts concerned.

Table 1

#### Current legislative activities (Section III.A below considers future legislative activities)

<i>Topic</i>	<i>Report and document references</i>	<i>Envisaged completion date</i>
<i>Arbitration (WG II)</i>		
Draft convention on transparency in treaty-based investor-State arbitration	A/CN.9/812	2014
<i>Online dispute resolution (WG III)</i>		
Preparation of a legal standard on online dispute resolution for cross-border electronic transactions	A/CN.9/795 and A/CN.9/801	Estimated 2015 or beyond
<i>Electronic commerce (WG IV)</i>		
Electronic transferable records	A/CN.9/797 and A/CN.9/804	Estimated 2015 or beyond
<i>Insolvency (WG V)</i>		
(i) Model law or legislative provisions on selected international issues, including jurisdiction, access and recognition in the cross-border insolvency of enterprise groups	A/CN.9/691 A/65/17 <sup>2</sup> A/CN.9/798 A/CN.9/803 A/CN.9/815	Estimated 2016 or beyond
(ii) Obligations of directors of enterprise groups members in the period approaching insolvency	A/CN.9/691 A/65/17 <sup>3</sup>	Estimated 2015 or beyond
(iii) Study on the insolvency of large and complex financial institutions	A/CN.9/691 A/65/17 <sup>4</sup> A/CN.9/798	Ongoing
<i>MSMEs</i>		
Preparation of legal standards on simplified business incorporation and registration	A/CN.9/800	Estimated 2015 or beyond
<i>Security interests (WG VI)</i>		
Preparation of a draft Model Law on Secured Transactions	A/CN.9/796 and A/CN.9/802	2015

6. As the table indicates, a draft convention on transparency in treaty-based investor-State arbitration, prepared by Working Group II, will be presented for consideration at this Commission session.

### B. Other activities

7. The reports available to the forty-seventh session of the Commission describing UNCITRAL's current activities in the provision of technical assistance, promoting ways to ensure a uniform interpretation and application of UNCITRAL texts; identifying the status of and work of other bodies in promoting its texts, coordination and cooperation with other relevant bodies and promoting the rule of law at the national and international levels are as follows:

A/CN.9/805 — Bibliography of recent writings related to UNCITRAL's work;

<sup>2</sup> A/65/17, para. 259 (a).

<sup>3</sup> A/65/17, para. 260.

<sup>4</sup> A/65/17, para. 260.

A/CN.9/818 — Technical assistance to law reform and technical assistance resources, including UNCITRAL publications, the UNCITRAL website and UNCITRAL regional presence: survey of the activities undertaken by the UNCITRAL Regional Centre for Asia and the Pacific (RCAP);

A/CN.9/806 — Status and promotion of UNCITRAL legal texts (status of the conventions and model laws resulting from UNCITRAL's work as well as the status of the New York Convention);

A/CN.9/809 — Coordination and cooperation: (i) Brief survey of the activities undertaken by the Secretariat; (ii) Reports of other international organizations;

A/CN.9/810 — Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts: (i) Case Law on UNCITRAL texts (CLOUT), (ii) Digests of case law relating to UNCITRAL legal texts;

Oral report — Role of UNCITRAL in promoting the rule of law at the national and international levels.

### III. Summary of mandated and possible activities after July 2014

#### A. Legislative work

##### 1. Mandated future work

8. The phrase “mandated future work” refers to planned legislative development, i.e. work that the Commission has remitted to a working group.

9. The Commission has mandated future work to Working Group II as regards the UNCITRAL Notes on Organizing Arbitral Proceedings (1996).<sup>5</sup> At its forty-sixth session, in 2013, the Commission considered that the UNCITRAL Notes on Organizing Arbitral Proceedings (1996)<sup>6</sup> required updating as a matter of priority. It was agreed that the preferred forum for that work would be that of a working group, to ensure that the universal acceptability of those Notes would be preserved (A/68/17, para. 130). At its sixtieth session, the Working Group reiterated its understanding that it would commence work on the revision of the Notes on Organizing Arbitral Proceedings at its sixty-first session (A/CN.9/799, para. 147).

##### 2. Possible future work

10. The phrase “possible future work” refers to legislative development proposed to the Commission, but in respect of which it has not yet provided a mandate to a working group.

11. The Commission has before it proposals for possible future work on the subject areas set out in Table 2 below. The final column of the table identifies areas in which a proposal may involve issues of another subject-area.

Table 2  
Summary of possible future legislative activity

<i>Subject area</i>	<i>Proposal</i>	<i>Document reference</i>	<i>Other relevant subject areas</i>
Arbitration	Concurrent proceedings in the field of investment arbitration	Para. 13 (a) below Addendum to this Note	—
Electronic commerce	Identity management, mobile payments and electronic single windows	Para. 13 (b) below	MSMEs (mobile payments)

<sup>5</sup> UNCITRAL Yearbook, vol. XXVII: 1996, part three, annex II.

<sup>6</sup> UNCITRAL Yearbook, vol. XXVII: 1996, part three, annex II.

<i>Subject area</i>	<i>Proposal</i>	<i>Document reference</i>	<i>Other relevant subject areas</i>
Insolvency	(i) Insolvency of MSMEs	Para. 13 (c) below	
	(ii) Enforcement of insolvency-derived judgements	Para. 13 (c) below	
	(iii) Convention on selected international insolvency issues	Para. 13 (c) below A/CN.9/691 A/65/17 <sup>7</sup> A/CN.9/815	
International contract law	Broad proposal on international contract law	Para. 13 (d) below	–
MSMEs	Development of legal standards on dispute resolution, access to financial services, access to credit, and insolvency	Para. 13 (d) below A/68/17, paras. 316-321	Arbitration and conciliation, Insolvency, Security Interests
Online Dispute Resolution	Preparation of guidelines for ODR providers and platforms	Para. 13 (e) below A/CN.9/WG.III/WP.128	
PPPs	Development of a Model Law and supporting Guide to Enactment	Para. 13 (f) below A/CN.9/819, A/CN.9/820, A/CN.9/821	Arbitration/ conciliation, MSMEs, Insolvency, Security Interests
Security interests	Guide to Enactment of the Model Law on Secured Transactions Contractual Guide on Secured Transactions – Uniform law text on intellectual property licensing	Para. 13 (g) below	

12. Further proposals may be made to the Commission at its current session, recommending legislative mandates for other subject-areas.

13. Details of the proposals outlined in Table 2 are found in the following paragraphs, and the documents referred to therein.

(a) *Arbitration*: The Commission may wish to recall that, at its forty-sixth session, in 2013, it considered work that could be recommended in the field of international arbitration. In that context, it was suggested that the subject of concurrent proceedings was increasingly important, particularly in the field of investment arbitration, and might warrant further consideration. In particular, it was said that it was not unusual for one arbitration to be initiated in relation to a particular dispute, and concurrently for related parties to initiate parallel proceedings, to seek, in whole or in part, the same relief. It was further said that addressing the subject of concurrent proceedings would also be in the spirit of promoting a harmonized and consistent approach to arbitration. Some delegations observed that the issue of concurrent proceedings was in such flux that developing a harmonized approach at the present time might be premature. The Commission was informed that the International Arbitration Institute (IAI, Paris), the Geneva Centre for International Dispute Settlement (CIDS) and the Secretariat jointly organized a conference on that topic on 22 November 2013, and that the Secretariat would report to the Commission on issues identified at that conference. The Addendum to document A/CN.9/816 provides further details on the proposals in this subject-area.

(b) *Electronic commerce*: The Commission agreed at its forty-sixth session to assess at a future time whether legislative development in electronic commerce would extend to identity management, single windows and mobile commerce (A/68/17, para. 313). Work continues through informal working methods on electronic single windows. Working Group IV may make recommendations regarding work on identity

<sup>7</sup> A/65/17, para. 259 (a).

management at its 49th session. The report of that Working Group session will be issued after the date of this document (document A/CN.9/804).

(c) *Insolvency*: At its forty-sixth session, in 2013, the Commission decided that Working Group V (Insolvency Law) should hold a colloquium in the first few days of the working group session scheduled for the second half of 2013 to consider, inter alia, topics for possible future work, including insolvency issues specific to MSMEs. The conclusions of that colloquium would not be determinative but should be considered and evaluated by the Working Group in the remaining days of that session, in the context of the existing mandate. Topics identified for possible future work should be reported to the Commission in 2014.

The UNCITRAL International Insolvency Law Colloquium was held on 16-18 December 2013 in Vienna as part of the forty-fourth session of the Working Group (Vienna, 16-20 December 2013). Further background materials and presentations made at the colloquium are available at the following page on the UNCITRAL website: [www.uncitral.org/uncitral/en/commission/colloquia/insolvency-2013.html](http://www.uncitral.org/uncitral/en/commission/colloquia/insolvency-2013.html). The report of the colloquium is before the Commission (A/CN.9/815).

The issues discussed at the colloquium were considered and evaluated by the Working Group at the end of its forty-fourth session and it was agreed that there remained significant areas for possible future work in the field of insolvency law. Having considered the priority in which work on the topics discussed might be undertaken, the Working Group was strongly of the view that at an appropriate time it should seek a mandate from the Commission to commence work on the recognition and enforcement of insolvency-derived judgements. The Working Group was also of the view that choice of law issues relating to insolvency, review of the chapter of the UNCITRAL Legislative Guide on Insolvency Law dealing with the insolvency treatment of financial contracts and netting, and the treatment of intellectual property contracts in cross-border insolvency cases were important issues that warranted consideration, and should be retained in that order as candidates for possible future work (A/CN.9/798, para. 30).

At its forty-fifth session, in response to the request from the Commission for Working Group V to provide advice as to whether the UNCITRAL Legislative Guide on Insolvency Law provided sufficient and adequate solutions for the insolvency of MSMEs, the Working Group agreed that the issues facing MSMEs were not entirely novel and that solutions for them should be developed in light of the key insolvency principles and the guidance already provided by the Legislative Guide. As to the form that work might take, the Working Group agreed that, while such work might form an additional part to the Legislative Guide, no firm conclusion on that point could be taken in advance of undertaking a thorough analysis of the issues at stake. The Working Group further agreed that it would not be necessary to wait for the results of the work being done by Working Group I in order to commence the study of insolvency regimes for MSMEs (A/CN.9/803, para. 14).

With respect to the other topics noted as possible priorities for future work, the Working Group:

- (i) Recommended that it be granted a mandate to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-derived judgements (A/CN.9/803, para. 41). It is envisaged that work on the implementation of such a mandate could be conducted in parallel with the topics covered by the existing mandate;
- (ii) Noted the establishment of an informal group to study the feasibility of developing a convention on international insolvency law, as well as wider adoption of the Model Law on Cross-Border Insolvency (A/CN.9/798, para. 19); and
- (iii) Noted the interest and the support given by some delegations and observer groups to form a study group to consider whether there were inconsistencies between the current treatment of financial contracts in the Legislative Guide and



recent developments and to provide the Working Group with a report (A/CN.9/803, para. 42).

(d) *International contract law*: The Secretariat has continued to promote the adoption and monitor the uniform interpretation of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (“CISG”) and has compiled citations to relevant documents in the field in the bibliography on its website. In the framework of those ongoing activities, and in line with the Commission’s request to celebrate the CISG 35th anniversary in 2015, the Secretariat is planning additional activities related to the CISG and its complementary texts, i.e. the Convention on the Limitation Period in the International Sale of Goods (New York, 1974), as amended by the Protocol of 1980 (Vienna); and the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005); as well as related non-UNCITRAL texts, such as the Unidroit Principles of International Commercial Contracts and regional sales law texts. The Commission will hear an oral report on the progress in the planning of those activities, which are being undertaken to identify possible future work in this subject-area.

(e) *MSMEs*: At its forty-sixth session, in 2013, the Commission took note of five broad areas in which the participants at the 16-18 January 2013 Colloquium on the topic had recommended work should begin on addressing the legal aspects of an enabling legal environment for MSMEs. The five topics were: simplified business start-up and operation procedures, alternative or online dispute resolution, access to financial services, access to credit and insolvency. The Commission agreed that work aimed at reducing the legal obstacles faced by MSMEs throughout their life cycle should be commenced, and that such work should start with a focus on the legal questions surrounding the simplification of incorporation (A/68/17, paras. 317 and 321).

(f) *Online Dispute Resolution*: At its forty-sixth session, the Commission reaffirmed the mandate of Working Group III to prepare a legal standard on online dispute resolution in low-value, high-volume cross-border electronic transactions.<sup>8</sup> The Working Group continues to prepare procedural rules for the resolution of online disputes, and may proceed to consider the possible preparation of guidelines for ODR providers and platforms (see A/CN.9/WG.III/WP.128).

(g) *Public procurement and related areas, including public-private partnerships (PPPs)*: At its forty-sixth session, in 2013, the Commission considered the report of a Colloquium on possible future work in PPPs held in May 2013, and requested further preparatory work on the topic to set a precise scope for any mandate to be given for development in a working group (A/68/17, para. 331).

Since that point, the Secretariat has engaged in studies and consultations with experts, and has held an “International Colloquium on PPPs”, (Vienna, 3-4 March 2014). The report of the colloquium (A/CN.9/821), and the discussion papers (A/CN.9/819 and A/CN.9/820) upon which the colloquium based its conclusions, are before the Commission at this session. Further background materials and presentations made at the colloquium are available at the following page on the UNCITRAL website —[www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2014.html](http://www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2014.html).

The colloquium reaffirmed the potential of PPPs to make enormous contributions to sustainable economic and social development, and in particular to fill a significant infrastructure funding gap identified by many empirical studies and commentators. It considered that the resultant need was most acute in developing countries, and that PPPs with small private operators (such as MSMEs) could also support local and regional development. Experience with substandard and failing PPPs, it was recognized, underscored the need for an effective legislative model for States to use to develop best practices and standards so as to allow efficient and effective PPPs.

<sup>8</sup> [Ibid.], *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 222.

The scope of a future legislative text on PPPs was clarified during the colloquium, fulfilling the Commission's 2013 request noted above. The colloquium also concluded that the scope of work proposed to be undertaken was as well-defined as it reasonably could be before legislative development of a text commenced. Consequently, the colloquium recommended to the Commission that it provide a mandate for the development of a Model Law and accompanying Guide to Enactment on PPPs (A/CN.9/821, paras. 120-121).

The Colloquium emphasized the benefits of undertaking such a project through a working group (supported by intersessional consultations) that would enable and encourage States at all levels of development to participate, and urged the Commission, taking into account the need to prioritize thematic areas of UNCITRAL's work, to explore all possibilities to facilitate legislative development on PPPs in this manner (A/CN.9/821, paras. 127-130).

In summary, documents A/CN.9/819, A/CN.9/820 and A/CN.9/821 provide further details of the proposals in this subject-area. In the light of the recommendations of the Colloquium, it is proposed that the work envisaged on PPPs in the year to the next Commission session take place through one or more weeks of conference time, and informal working methods to include consultations through meetings, video/telephone conferences and other communications.

(h) *Security Interests*: As Table 1 indicates, it is envisaged that a draft Model Law on Secured Transactions (the "draft Model Law") will be completed and submitted by Working Group VI to the Commission for consideration and adoption in 2015. At its twenty-fifth session, the Working Group considered some definitions and three draft model provisions on security interests on non-intermediated securities and adopted a recommendation to the Commission that the draft Model Law should address security interests in non-intermediated securities (A/CN.9/802, paras. 72-93). At the present session, the Commission will have before it, in addition to the reports of the Working Group (A/CN.9/796 and A/CN.9/802), a note by the Secretariat on security interests in non-intermediated securities. The Commission may wish to consider the reports of the Working Group and that note and decide that the draft Model Law should include some definitions and draft model provisions on security interests in non-intermediated securities.

Working Group VI is expected to complete its work on the draft Model Law on Secured Transactions (including, subject to approval by the Commission, with respect to non-intermediated securities), and submit it to the Commission for consideration and approval in 2015. In considering the draft Model Law, the Working Group has referred a number of matters to a guide to enactment of the draft Model Law for clarification. This guide to enactment can include references to the UNCITRAL Legislative Guide on Secured Transactions (the "Secured Transactions Guide") which refers to the various policy approaches that the legislator may follow with their comparative advantages and disadvantages and includes legislative recommendations as conclusions. However, the guide to enactment needs to explain in a short and focused way the draft model provisions that have a different formulation, different structure, and, subject to approval by the Commission, a different scope from that of the Secured Transactions Guide. Thus, the Working Group will need two more working group sessions (fall 2015 and spring 2016) to complete this guide to enactment. The Working Group will also need to be given the mandate to make any changes to the draft Model Law that may become necessary as a result of the discussion of the guide to enactment, which will be considered by the Commission in 2016 together with the guide to enactment. As to the contractual guide on secured transactions in particular for small- and medium-size enterprises and enterprises in developing countries, and to a uniform law text on intellectual property licensing, topics that were placed by the Commission on its future work agenda at its forty-third session (see A/65/17, paras. 264 and 273), the Commission may wish to consider them at a future session on the basis of notes to be prepared by the Secretariat, after a colloquium or expert group meeting.

Document A/CN.9/811 provides further details of the proposals in this subject-area.

14. The Commission may wish to assess the need for conference time for those of the above proposals it decides to take up, and to make recommendations regarding informal working methods accordingly.

## **B. Current and possible future activities to support the adoption and use of UNCITRAL texts**

15. Details of current activities to support the adoption and use of UNCITRAL texts are found in the series of documents before it regarding activities other than legislative development (listed in para. 7 above).

16. In accordance with the deliberations of the Commission at its second, third, thirty-first, forty-first, forty-fourth and forty-fifth sessions where it promoted the dissemination of information and the harmonization of the application of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”, A/CN.9/814, para. 1) as well as the preparation of a guide on that convention, the Secretariat is preparing a guide on the New York Convention, in close cooperation with experts. Chapters of the guide are contained in documents A/CN.9/786, A/CN.9/814 and its addenda.

17. The Secretariat plans to prepare and distribute an accession toolkit in respect of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the “Rotterdam Rules”). It is anticipated that this text will assist States intending to ratify the Rotterdam Rules and that it will be finalized for the Commission to note at its 48th session in 2015.

## **IV. Allocation of resources and prioritization**

### **A. Extent of future legislative development and need for prioritization, or alteration in working methods**

18. At its forty-sixth session, the Commission underscored the importance of a strategic approach to resource allocation, in the light of the increasing number of topics referred to UNCITRAL for consideration (A/68/17, para. 294). The Commission therefore set out certain strategic considerations, including as regards prioritization among subject-areas and activities, and resource considerations (A/68/17, para. 295).

19. As regards the allocation of resources for legislative development, the Commission has regularly emphasized the benefit of UNCITRAL’s primary working method — that is, legislative development through formal negotiations in a working group. A key element of the process is that the resultant text is recommended to the Commission for consideration and adoption. This approach will be referred to as “formal working methods”. The alternative approach, legislative development through (for example) Secretariat studies, assistance of outside experts and colloquia, will be referred to as “informal working methods”. Document A/CN.9/752 noted the exceptional situations in which legislative texts had been developed through informal working methods (para. 33).

20. Formal working methods, as a general rule, involve the allocation of a single subject-area to a working group for the development of a legislative text, and the allocation of two weeks’ conference time per year for that purpose. The Commission acknowledged that this allocation could also be undertaken flexibly, rather than through an automatic allocation of two weeks per subject per year (A/68/17, para. 298).

21. The preceding sections of this Note indicate that there are at least eight subject-areas in which legislative activity is ongoing and/or for which it is

proposed. Undertaking legislative development using two weeks of conference time per subject, therefore, would require considerably more than the twelve weeks normally allocated to working group sessions.

22. The Commission is therefore invited to address the allocation of resources to future work in the light of the lack of capacity to undertake all proposed legislative development using formal working methods. The Commission may wish to assess the extent of future legislative development (that is, whether all subject-areas should be subject to further legislative development), the recommendations for allocation of conference time and that work can be undertaken using informal working methods together.

23. The Commission may also wish to take into account its review on the use of formal working methods at its forty-sixth session, set out in paragraphs 300 and 303-306 of A/68/17, itself based on the detailed discussion in Section IV of document A/CN.9/774. The main conclusions reached at that session are summarized below, for ease of reference.

24. First, the Commission set out four tests that it would bear in mind in deciding whether to take up a topic and remit legislative development in the subject-area to a working group:

(a) Is it clear that a topic is likely to be amenable to harmonization and the consensual development of a legislative text?

(b) Are the scope of a future text and the policy issues for deliberation sufficiently clear?

(c) Is there a sufficient likelihood that a legislative text on the topic would enhance the law of international trade?

(d) Legislative development should not be undertaken if so doing would duplicate work on topics being undertaken by other law reform bodies, and preparatory work to identify any areas of potential duplication should be undertaken before a topic is referred to a working group (A/68/17, paras. 303-304).

25. Secondly, the Commission emphasized that the mandate for a working group should be precise, should reflect the maturity of the subject-matter and should clearly identify the scope of work to be undertaken, including the envisaged nature of the legislative text where appropriate (A/68/17, para. 302).

26. In the light of the lack of conference time noted above, the Commission may wish to assess the requirements recalled in the preceding two paragraphs not only as an initial consideration when deciding whether to refer a topic to a working group, but also on a continuing basis. So doing would be one way to assess whether legislative development through formal working methods only or as the main approach remains appropriate, or whether more use of informal working methods would be a suitable alternative. The following paragraphs will refer to the requirements set out in the preceding two paragraphs as "formal resource allocation requirements".

27. The Commission might also wish to request working groups regularly to consider formal resource allocation requirements as an item on their agenda, and report accordingly to the Commission. Regular reports from working groups, colloquia and other documents that are before the Commission in their current format could also assist it in assessing formal resource allocation requirements.

28. After assessing formal resource allocation requirements, the Commission may find that the available conference time is insufficient for all desired legislative development through formal working methods, given the current practice in the allocation of conference time among working groups.

29. If so, the Commission may wish to consider the following options, among others:

(a) The creation of an additional working group;

(b) Adapting the current approach of allocating a single subject-area to a working group, perhaps in combination with taking a more flexible approach to the allocation of conference time among working groups (i.e., revising the general automatic allocation of two weeks per subject per working group and per year);

(c) Undertaking some legislative development in one or more subject-areas through greater use of informal working methods; and/or

(d) The exclusion of a subject-area from legislative activity, at least on a temporary basis, based on the relative priority of subject-areas.

30. It will be evident that these options are not mutually exclusive, and that a combination of approaches may be appropriate for different subject-areas. The following subsections set out some considerations relevant to each option, which the Commission may wish to take into account during its deliberations.

**(a) The creation of an additional working group**

31. The Commission may wish to recommend to the General Assembly that a seventh working group be created, so as to allow for more legislative development than is currently possible. If it considers this step appropriate, it may wish to make recommendations (a) regarding the use of up to sixteen weeks of conference time that is available per annum for the meetings of UNCITRAL and its working groups; and (b) regarding additional resources that would be required to allow the Secretariat to service an additional working group. It may also wish to make contingency plans should the General Assembly not provide the resources identified as necessary for the fulfilment of any new mandates provided by the Commission.

**(b) A more flexible approach to the allocation of conference time**

32. The Commission may consider that more than one subject-area could be allocated to a working group in each year. In this regard, the Commission may wish to recall its discussion at its forty-sixth session (A/68/17, para. 298). As reported in document A/CN.9/752, paras. 23 and 34, servicing six working groups stretches the resources of the Secretariat to the extent that quality may be negatively affected; the Commission may consider that allocating more than one topic to each working group, or other methods designed to achieve greater flexibility, should be undertaken with care to avoid greater risks to quality.

**(c) More flexible approach to combining formal and informal working methods**

33. This approach was considered in general terms at the forty-sixth session (A/68/17, paras. 295 and 300-301), drawing on the information contained in both A/CN.9/752 (para. 34) and A/CN.9/774 (paras. 38-42). The Commission recalled that the Commission stated even at its first session that the balance between informal and formal negotiations should be assessed in the light of the nature of the topic concerned (A/72/16, para. 43, as reported in A/CN.9/774, para. 36; see also A/CN.9/752, paras. 35 and 37-40).

34. The Commission will be aware that legislative development routinely combines formal and informal working methods, as the Secretariat prepares for each working group session and consults with experts for that purpose. Nonetheless, the Commission at its last session reaffirmed that the primary method for the development of UNCITRAL texts should remain the formal one, as the transparency, multilingualism and inclusiveness that the formal negotiation process involves supports the universal applicability and acceptance of those texts (A/68/17, para. 300, noting the issues set out in A/CN.9/774, paras. 15-17).

35. In addition, the Commission suggested that there should be a limit to the length of time that a working group should remain seized of a subject-area. While recognizing the importance of creating and retaining expertise within working groups, to ensure the quality and sustained relevance of UNCITRAL texts, and the time involved, it cautioned against the creation of de facto semi-permanent or permanent working groups whose remit and mandate is not reviewed regularly. Otherwise, the

Commission noted, topics it might consider to be high priorities for UNCITRAL to work upon might be crowded out (A/68/17, para. 299).

*Review of mandate of working group*

36. There are several situations that provide opportunities to review the remit and mandate of a working group for a particular subject area, and therefore stages in the legislative development process (in its broadest sense) when it may be appropriate to move further development between formal and informal working methods.

37. The most obvious such stage arises when a legislative text is adopted. At this stage, the Commission frequently considers recommendations for future work in that subject-area from the working group concerned. The Commission may consider that the resource allocation requirements should be considered afresh before a working group is mandated to start work on another legislative text in a particular subject-area. The result of such an assessment may be that preparatory work is considered necessary before the topic concerned is ready for submission to a working group. (For the possible benefits of a short break in legislative development in a subject-area in terms of supporting the promotion and adoption of UNCITRAL texts, see paras. 40-45 below.)

38. There are other stages when a change in working methods may be appropriate, as the Commission has recognized, when a working group is mandated to develop a text. They include the point at which provisions on highly technical aspects of topics are to be drafted, and drafting a text that is nearing completion, including through the use of drafting groups. (A/CN.9/774, para. 43, and A/68/17, para. 301). A further situation may arise where there is a need to research and consult widely on possible solutions to issues arising during legislative development upon which consensus cannot be found in a working group, and/or that may indicate that the four tests set out in paragraph 24 above and requirement for a precise mandate recalled in paragraph 25 above are no longer satisfied.

39. Whether the Commission requests preparatory work before a working group takes up a topic, or requests further informal consultations before a working group continues working on a legislative text already under development, it may therefore recommend a pause in the use of conference time for legislative development in a particular subject-area.

*Benefits of combining formal and informal working methods*

40. Allowing for breaks in the use of conference time for the development of a text, while informal consultations or other preparatory work are undertaken, may enhance the efficacy of the use of conference time overall, eventually allowing for legislative development in more subject-areas than might otherwise be the case. Such an approach could also reduce the risk of creating working groups that are tied to a particular subject-area on a semi-permanent or permanent basis.

41. The Commission may, however, consider that such breaks would be potentially disruptive and so should be provided for as the exception, rather than the rule. However, it may believe that the flexibility to allow for them should not be excluded.

42. The Commission may acknowledge that this approach requires a detailed review of progress of working groups, and may involve the Commission in taking views on relative priorities that are not always in accordance with those of its working groups. However, the assessment of current and future legislative development together in the ways described above may allow the Commission to apply its strategic considerations more consistently.

43. It may also be noted that considering the balance of work through formal and informal methods can enable the Commission to consider the priority to be ascribed to a future text both in terms of its importance and the appropriate time frame (as further discussed in para. 32 of document A/CN.9/774).

*Possible advantages of a more regular turnover in working groups*

44. The Commission may wish to consider whether the current situation over-emphasizes the link between a subject-area and a particular working group, with the result that the members of working groups are reluctant to agree to a break in legislative development through formal working methods in the subject-area concerned because of the risk that further conference time will not become available in the short- to medium-term. Providing for a more regular and predictable turnover of working groups and subject-areas could also encourage a more flexible and responsive approach to the allocation of conference time as a whole.

45. If breaks in legislative development are used to engage in consultations and other preparatory work, and are recognized as a normal part of legislative development in UNCITRAL, the valuable expertise built up in a working group could still be retained. Accordingly, if and when a topic is resubmitted to a working group, legislative development can then continue with as little disruption as possible. The Commission may consider that such an approach can assist in balancing the need for continuing expertise and its wish to avoid creating permanent or semi-permanent working groups.

*Advantages and possible concerns in greater use of informal working methods*

46. The Commission has agreed that the Secretariat should continue to exercise flexibility in organizing informal work to suit the needs of each relevant subject-area, but has stressed that there should be limits to such informal working methods. In particular, the Commission has emphasized and that all legislative texts should be considered by the Commission prior to adoption (A/68/17, para. 301).

47. The Commission has also expressed concerns about some aspects of informal working methods, including that there may be less than full transparency, decreased multilingualism and inclusiveness, and possible dominance by specialized groups and interests (A/68/17, para. 301).

48. On the other hand, the Commission may recall certain benefits of informal working methods. They include that consultations prior to and between working group sessions can help to ensure that a legislative text is finalized as early as possible (and as noted above, potentially thereby allowing for legislative development in more subject-areas than might otherwise be the case). Allowing issues to be widely discussed during the development process, including with the support of regional organizations including the multilateral development banks where possible, may facilitate the inclusion of experience from all regions and reduce the impact of some of the other concerns about informal working methods noted above.

49. In this regard, the Commission may consider that the use of colloquia serves as a hybrid between formal and informal working methods, in that their documents are available on the UNCITRAL website, and that there is flexibility in organizing them on a multilingual basis. To this extent, colloquia may help to reduce the impact of the above concerns. However, the Commission may also recognize that full transparency, multilingualism and inclusiveness will be achieved where the colloquia are undertaken using conference time (which includes translation resources): that is, taking time that would otherwise be allocated to a working group or to the Commission itself.

50. In addition, the Commission may consider that ensuring that legislative texts are developed using formal as well as informal working methods (through continuing to review texts prior to adoption, whether or not they have previously been drafted by a working group) can also reduce the impact of these concerns.

*Resource implications of greater use of informal working methods*

51. Seeking to increase UNCITRAL's overall capacity to develop legislative texts through greater use of informal working methods effectively increases the requirement for resources within the Secretariat. Additional resources would be required not only for the informal working methods themselves, but also for a greater

level of planning and coordination, and the publication of more information on the UNCITRAL website than is practicable using current resources.

52. Paragraphs 45-47 of document A/CN.9/774 noted existing constraints in the timely availability of official documents in all United Nations official languages; it is unlikely that documents to support informal working methods could be issued other than in English unless additional external resources are available (see, further, Section IV of A/CN.9/816). The Commission has also been invited to consider rationalizing the volume and contents of documents (A/CN.9/774, paras. 34 and 36), at the more general level.

53. Assuming that UNCITRAL's resources remain at their current level, a further consequence of greater use of informal working methods would be that other activities of the Secretariat would need to be reduced commensurately. (These activities are described in the documents referred to in para. 7 above, and future work in this regard is considered in the next Section of this Note.) The activities themselves — as noted in paragraph 38 of document A/CN.9/774 and paragraphs 35 and 37-40 of A/CN.9/752 — can also enhance the efficiency of the legislative development process, for example in enabling better background information on legislative needs to be identified before proposals for legislative development are formulated.

54. Furthermore, UNCITRAL's budget is structured around its human resources, with limited additional financial resources. It is largely such additional financial resources that would be needed to increase the use of informal working methods (to allow for bringing experts to Vienna for informal consultations, travel to regional consultations, and hiring consultants where necessary; and improved information dissemination). Unfortunately, these very resources are a main focus of cuts to the United Nations budget. The Commission may therefore wish to bear in mind that the Secretariat will not be able to engage in unlimited additional legislative development through informal working methods. (For discussions of activities seeking extrabudgetary resources, see Section IV of document A/CN.9/816).

**(d) Exclusion of some subject-areas from legislative development in UNCITRAL**

55. The Commission may wish to take into account certain factors that it has previously noted might guide prioritization among subject-areas where all cannot be accommodated within UNCITRAL. Some such factors are set out in paragraphs 20-29 of document A/CN.9/774 (citing earlier UNCITRAL reports), and can be summarized as follows:

(a) Success in harmonization of international trade law may be more easily achieved in technical areas rather than those closely connected with fundamental legal traditions and basic principles of domestic law;

(b) There should be an economic need for harmonization and evidence of a probable beneficial effect on international trade;

(c) That texts of the UNCITRAL type may have a radiation effect, encouraging their application beyond adoption per se;

(d) The importance of considering the role and relevance of UNCITRAL activities within the broader United Nations agenda and the priorities of donor communities and national Governments should not lead to a blanket adoption of other agencies' priorities (A/68/17, para. 306).

56. Applying these considerations, and where topics suitable for legislative development exceed the available resources, the Commission may wish to assess whether legislative development in some subject-areas would be more likely to be successful in enhancing the law of international trade in the broad sense, and would better reflect the priorities of the United Nations, members of donor communities and national Governments, than such development in other subject-areas.



**B. Note by the Secretariat on planned and possible  
future work — part II**

(A/CN.9/816)

[Original: English]

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**IV. Allocation of resources and prioritization (continued from  
document A/CN.9/807)**

**B. Activities to support the adoption and use of UNCITRAL texts**

57. The following paragraphs will refer to the provision of technical assistance, promoting the uniform interpretation and application of UNCITRAL texts, coordination and cooperation with other relevant bodies in promoting and using UNCITRAL texts, and promoting the rule of law at the national and international levels. For convenience, the shorthand term “support activities” will be used to refer to all such activities collectively. Document A/CN.9/752 provides further details of past and ongoing support activities (paras. 41-51).

58. The report to the Commission for this session on “Technical cooperation and assistance” (document A/CN.9/818) summarizes the benefits of technical assistance, many of which apply to support activities as a whole. As the Commission has noted, engaging in support activities is a core part of UNCITRAL’s mandate to harmonize international trade law (see, further, A/CN.9/752, para. 3). The Introduction to that report notes that support activities have been recognized and endorsed by the Commission and the General Assembly: the General Assembly also stated that they represent one of UNCITRAL’s priorities, and encouraged steps to be taken to facilitate such work (document A/CN.9/818, para. 1 and footnote 1). The Commission is also referred to the other reports on support activities in the year to this Commission session listed in paragraph 7 of document A/CN.9/807.

59. Document A/CN.9/752 also notes that almost all such activities are undertaken through the Secretariat A/CN.9/752 (para. 57). As previously agreed by the Commission (A/CN.9/774, paras. 39-42, A/68/17, para. 307), and as further related at several places in the reports for this session referred to in the previous paragraph, the demand for such activities far exceeds the resources available in the Secretariat to meet it.

60. Indeed, in its forty-fifth session, the Commission noted that consequences of UNCITRAL’s focus on legislative activity included a general lack of Secretariat staff and resources for support activities, including the servicing of existing texts, and a lack of Secretariat expertise to service some UNCITRAL texts (A/CN.9/752, paras. 56-60, also citing A/66/17, para. 257). If the Commission seeks to increase legislative activity as a whole through greater use of informal working methods, there is a risk that the resources available for support activities will be further reduced, and these consequences may be exacerbated.

61. One approach to mitigate these risks, which the Commission may wish to take up, would be to reconsider the generally swift move from adoption of one legislative text to the next topic for legislative development also noted in A/CN.9/752, paragraph 56. Also applying the suggestion that there could be a pause in legislative

development through formal methods in some circumstances (see para. 39 of document A/CN.9/807), the Commission could build a pause between the completion of a text and commencement of work to develop a further text into UNCITRAL's legislative activity. So doing could allow time to focus on promotion of the recently-completed text and other support activities, such as identifying a strategy for promotion of a text and developing promotional materials (A/CN.9/752, para. 62 (c)). Such a pause could also, as noted in paragraphs 40-45 of document A/CN.9/807 above, allow for the more regular turnover of subject areas and working groups, with the potential benefits noted above, and allow UNCITRAL to achieve an appropriate balance between developing new texts and administering existing texts (the need for which was noted in A/CN.9/752, para. 58).

62. Nonetheless, the Commission may consider that there will remain insufficient resources in the Secretariat for the optimum level of support activities.

63. Document A/CN.9/752, in considering this point, highlights several issues that the Commission may wish to consider to enhance the use of existing resources, including the need:

(a) To develop more efficient ways of delivering technical assistance, including the greater use of videoconferencing, online training and other communications technologies, and of alternative tools for the promotion of texts (such as issuing practice guides), in order to reduce the need for Secretariat travel and associated expenses;

(b) To define a more active role for the Commission and member States in delivering that assistance;

(c) To engage in outreach activities and better communication on the mandate and work of UNCITRAL with decision makers on trade law at the national and regional levels, perhaps through the formation of a support activities or strategic planning committee within the Commission; and

(d) For a technical assistance programme to reflect the different needs of different UNCITRAL texts and varying strategies to promote them as a result (A/CN.9/752, paras. 59-62).

64. The Commission has also heard setting priorities in subject areas (which would also be applied to support activities) would enable the Secretariat to take a more proactive role in defining and shaping a programme for technical assistance and other support activities (A/CN.9/752, paras. 56-58, citing A/66/17, para. 257).

65. Clearly, however, it is unlikely that the Secretariat would have adequate resources to implement such a programme. The Commission may recall that most support activities are not covered by the regular budget (A/CN.9/775, para. 89). Recognizing this, documents A/CN.9/752 (e.g. paras. 59-62) and A/CN.9/774 (e.g. paras. 43 and 44) made some suggestions as to ways to increase the resources available to the Secretariat, including:

(a) Developing more strategic partnerships and cooperation activities with other relevant bodies;

(b) Promoting increased awareness of UNCITRAL texts within the United Nations system, among bilateral and multilateral donors and among States, and encouraging them and non-governmental organizations to take a greater role in support activities; and

(c) Using working groups and the Commission as resources to identify appropriate expertise, and setting aside time at UNCITRAL meetings for the discussion of States' support for the implementation and use of UNCITRAL texts.

66. The Commission may consider that additional resources, from external sources, would also be necessary. The Commission has heard reports of existing in-kind contributions and contributions to the UNCITRAL Trust Fund for Symposia and to grant travel assistance to developing countries that are members of UNCITRAL, but that these additional resources are insufficient to address the needs

concerned (A/CN.9/775, paras. 89-100). In addition to appealing for additional contributions, the Commission may wish to instruct the Secretariat to set aside time and resources both to develop a support activities programme for the medium-term and to seeking external resources to fund it, and that the Secretariat should report on the results of efforts in this regard at its next session.

67. The Commission noted at its forty-fifth session, in 2012, some preliminary proposals that could delineate the scope of a support activities programme so that it would involve an integrated approach from preparation for a legislative text through to technical assistance and monitoring of adopted texts (A/67/17, para. 230).

68. Elements suggested at that session, and other support activities could include:

(a) Hosting conferences, workshops or seminars, and issuing publications, to raise awareness and promote understanding of key legislative instruments, including developing practice guidelines for judges;

(b) Attendance at workshops, conferences and seminars related to existing UNCITRAL texts;

(c) Formalizing networking by creating a virtual list of participants that would allow experts to “meet” and exchange information, as well as help States that needed assistance to identify experts in the field;

(d) Partnering with other relevant bodies, such as those described above, to encourage them to include support activities for UNCITRAL texts into their own main activities and highlighting the role of the latter in helping States attract foreign trade and investment (A/67/17, para. 230); and

(e) Secretariat provision of advice, assistance and training to a wide range of potential users on UNCITRAL texts.

69. It will be evident that the resources needed for such activities would go beyond additional human resources, so that they could finance the production of additional materials for promotion and training (including the upgrading of the UNCITRAL website as the primary medium for dissemination of information), the hiring of expert consultants and the travel for the purpose of support activities.

70. Donor agencies would require indications of success in support activities. Here, the Commission may wish to consider whether the adoption of UNCITRAL texts alone would be too narrow a measure of success, and that ways to demonstrate the use of UNCITRAL texts by donor agencies and States should be developed.

71. The Commission may also wish to consider whether a support activities programme would, where adequately resourced, be able also to ensure that informal working methods can operate effectively, including as regards the maintenance of expertise in subject areas on the part of Secretariat staff, experts and that gained through participation in working groups. In this regard, a support activities programme could also underpin the potential benefits of the move between informal and formal working methods, without jeopardizing the maintenance of this necessary expertise.

72. A key feature of such a support activities programme would be partnering with other relevant agencies, such as Unidroit and the multilateral development banks, to identify possible future topics for joint activities. The Commission may wish to consider whether to instruct the Secretariat, as part of the development of such a programme, to coordinate with those bodies to identify such topics.

## V. Conclusions

73. Taking all these elements together, the Commission is invited to:

(a) Decide on the subject areas and possible texts in which legislative development should be undertaken using formal working methods during the period to the next Commission session, in 2015;

(b) Allocate the twelve weeks of conference time available to working groups accordingly, subject to any conference time to be devoted to colloquia and to any other recommendations for the conference time available for meetings of UNCITRAL and its working groups (up to sixteen weeks per annum);

(c) Decide on the extent to which legislative development should be undertaken using informal working methods in subject areas and for future texts during the period to the next Commission session, in 2015, if any;

(d) Decide whether conference time should be allocated to one or more colloquia during that period; and

(e) Decide on the subject areas and possible texts for which it is tentatively planned to engage in legislative development in the three to five years following that Commission session, and provide an indication as to the extent to which the legislative development will be undertaken using formal and/or informal methods; and

(f) Decide whether the Secretariat should engage in developing a support activities programme, and report to the Commission on progress at its forty-eighth session;

(g) Make such recommendations to the General Assembly or otherwise as to resources (including conference time, Secretariat staff and other resources) as the Commission may see fit.

## ADDENDUM

## POSSIBLE FUTURE WORK IN ARBITRATION — CONCURRENT PROCEEDINGS

**I. Introduction**

1. At its forty-sixth session (Vienna, 8-26 July 2013), the Commission considered work that could be recommended in the field of international arbitration.<sup>1</sup> In that context, it was suggested that the subject of concurrent proceedings was increasingly important, particularly in the field of investment arbitration, and might warrant further consideration. In particular, it was said that it was not unusual for one arbitration to be initiated in relation to a particular dispute, and concurrently for related parties to initiate parallel proceedings, to seek, in whole or in part, the same relief. It was further said that addressing the subject of concurrent proceedings would also be in the spirit of promoting a harmonized and consistent approach to arbitration. Some delegations observed that the issue of concurrent proceedings was in such flux that developing a harmonized approach at the present time might be premature.<sup>2</sup> The Commission was informed that the International Arbitration Institute (IAI, Paris), the Geneva Centre for International Dispute Settlement (CIDS) and the Secretariat jointly organized a conference on that topic on 22 November 2013, and that the Secretariat would report to the Commission on issues identified at that conference.<sup>3</sup>

2. The purpose of the present note is to briefly introduce the practical issues raised by concurrent proceedings in investment arbitration, as presented during the Conference mentioned above<sup>4</sup> and the possible means to reduce the instances of concurrent proceedings. This note does not address parallel proceedings in commercial arbitrations.

**II. Issues relating to concurrent proceedings****A. Definition and types of concurrent proceedings**

3. Multiple or concurrent judicial proceedings arising out of an investment are perceived as an increasingly problematic issue in the field of investor-State disputes.

4. However it is notable that a universal definition of “concurrent proceedings” does not exist in practice, and that for the purposes of any possible future work in relation to the perceived problems arising out these proceedings, a working definition would need to be agreed. Concurrent proceedings in this note refers to situations where more than one claim is filed against a State pursuant to an investment treaty, and where such claims involve substantially related parties, irrespective of their location, in relation to the same or substantially identical measure or measures taken

<sup>1</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, paras. 129-133 and 311.

<sup>2</sup> *Ibid.*, para. 131.

<sup>3</sup> A/CN.9/785, para. 18.

<sup>4</sup> This note is based on the following documentation: *Concurrent Proceedings in Investment Disputes*, IAI Series No. 9 (E. Gaillard and D. Reich, eds., 2014); “*Consolidation of Proceedings in Investment Arbitration: How can multiple proceedings arising from the same or related situations be handled efficiently?*”, Final Report of the Geneva Colloquium held on 22 April 2006, Gabrielle Kaufmann-Kohler, Laurence Boisson de Chazournes, Victor Bonnin, Makane Moïse Mbengue; “*Investment treaties as corporate law: Shareholder claims and issues of consistency. A preliminary framework for policy analysis?*”, David Gaukrodger, OECD Working Papers on International Investment, No. 2013/3, OECD Investment Division; “*Admissibility: Shareholder claims?*”, in *The International Law of Investment Claims*, Zackary Douglas; “*Parallel Proceedings in Investor-State Treaty Arbitration: Responses for Treaty-Drafters, Arbitrators and Parties?*”, Robin F. Hansen, *The Modern Law Review*, Vol. 73, No. 4, July 2010; *Parallel Proceedings in International Arbitration*, Bernardo M. Cremades and Ignacio Madalena; “*The coordination of Multiple Proceedings in Investment Arbitration?*”, Hanno Wehland, Oxford International Arbitration Series.

by that same State. However it is notable that different legal bases exist for assessing whether more than one claim against a State amounts to “concurrent proceedings”. This note does not purport to set out a comprehensive analysis in that respect.

5. The complexity of multinational corporate structures, the structures of investments themselves and the nature of contractual and treaty-based relationships between parties necessarily lead to a number of forms in which concurrent proceedings can arise. Several of these are set out below (under paras. 7 to 13).

6. Notably, although issues arising from the initiation of proceedings by substantially different investors (rather than related investors) (i) against the same State, in relation to the same State measure and the same applicable provisions of an investment treaty, or (ii) under different investment treaties, in relation to the same State measure, may both lead to similar disadvantages as in concurrent proceedings more strictly defined (for example, inconsistent jurisprudence), those categories of proceedings are not addressed further in this note.

#### **Different instruments: contract claims, and investment claims under investment treaties**

7. A number of different sources of law may confer rights upon investors and obligations on States. Contract and treaty obligations, for example, provide discrete bases for a substantive claim (with often different applicable substantive law), but a single measure from a host State can give rise to both a contract and a treaty claim.

8. The breach of a contract between an investor and a State may also serve as an indication that the treaty has been breached, and in some instances, umbrella clauses in investment treaties can premise a breach of a treaty on a contractual breach. However, the two are not necessarily codependent, and a contract claim and a treaty claim based on the same measure can be brought in different fora and under different substantive laws, even though the parties might be substantially the same and seeking substantially the same relief.

#### **Different actors: investor comprised of multiple entities with standing**

9. Investments are often structured through a number of different legal entities, more than one of which may be in a position to bring a claim against a host State.

10. A right of action has been consistently established in current investment arbitration where shares in the local company can show damage resulting from a State measure. Treaties typically protect the shares themselves as a “protected asset” and consequently even minority shareholders in a local company have been held to be protected against the loss of their share value under an investment treaty.

11. Indirect ownership of assets in the host State has also been deemed to gain protection under investment treaties, as have shareholders and indirect investors further down the corporate chain.

12. Other treaties may provide a broad definition of “investor”, such that a locally incorporated but foreign-controlled or foreign-incorporated company may be considered an investor, thus expanding the number of entities with standing under a given investment treaty.

13. Consequently, a number of different entities within the same corporate structure may have a right of action in relation to the same investment and against the same State measure, as long as all of them qualify as investors under an applicable treaty.

### **B. Issues raised by concurrent proceedings**

14. Concurrent proceedings are typically perceived as detrimental in investment treaty practice, which serves to undermine confidence in investment treaty arbitration.

15. Many criticisms of the practice of parallel proceedings relate to the possible breach of overarching principles of good faith and procedural fairness in the practice of international law. A number of specific criticisms can be described as follows.

16. First, where parallel proceedings are brought, a State must defend several claims in relation to the same measure, with potentially the same economic damage at stake, leading to a waste of resources and unnecessary costs.

17. Second, there is a risk of multiple recovery when claimants within the same corporate structure, but with distinct legal identities, claim on the basis of those separate identities in relation to the same or substantially the same damage.

18. Third, as with commercial arbitrations, concurrent proceedings in relation to the same State measure may result in inconsistent or contradictory jurisprudence. Parallel proceedings have likewise been criticized for inconsistent rulings on facts.

19. From a policy perspective, it may be considered that the existence or even the risk of concurrent proceedings might create some dissatisfaction for users of investment treaty arbitration and undermine predictability more generally.

### C. Possible future work in the field of concurrent proceedings

20. A number of options might be considered as a means to harmonize the approach of disputing parties, treaty Parties or arbitral tribunals in relation to concurrent proceedings, and to reduce the negative consequences that can result from those proceedings. The Commission may wish to consider that, in order to provide efficient results, certain options below would require a close cooperation with arbitral institutions active in the field of investment arbitration to devise any possible instrument.

#### Guidance to arbitral tribunals in relation to a *lis pendens* or *res judicata* principle

21. A matter for consideration might be the development of a standard or guidance in relation to the availability of concepts of *res judicata* or *lis pendens* within the realm of investor-State disputes.

22. Unlike in civil law or common law litigation proceedings, traditionally the concept of *lis pendens* has not been applied in international arbitration; an arbitral tribunal seized second in time with the same matter as another arbitral tribunal previously seized nonetheless has exclusive jurisdiction pursuant to the arbitration agreement conferring that jurisdiction. Nonetheless, *lis pendens* and *res judicata* are principles that are recognized in public international law and thus may be referenced as part of the *lex causae* of an investment dispute. In the often cited *Lauder v. Czech Republic* and *CME Republic BV v. Czech Republic* cases, the tribunal acknowledged the potential problem of conflicting awards, and that the second deciding court or tribunal could take the first decision into account when assessing final damage.

23. A *lis pendens* rule in the context of civil litigation proceedings is set out in Article 27(1) of the Brussels Regulation 44/2001 (“Brussels Regulation”), which provides that: “[w]here proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.”

24. In the context of investment treaty arbitration, determining the “same parties” for the purposes of such a rule could present a challenge. The Brussels Regulation (Article 28) also sets out a discretionary rule for “related actions”: “1. Where related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings. 2. Where these actions are pending at first instance, any court other than the court first seized may also, on application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in questions and its law permits the consolidation thereof. 3. Actions are deemed to

be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings.”

25. Matters that could be considered in this respect include: (i) whether devising guidance for a *lis pendens* rule in the same or related investment proceedings would be a means to harmonize international practice and reduce the occurrences of parallel proceedings in investment arbitration; (ii) the form such guidance could take, and in particular whether a standard would need to be contained in the underlying investment treaty; and (iii) whether such a standard is appropriate as between national proceedings and investment arbitration proceedings. Staying a second-in-time proceeding whilst a related proceeding is pending in a different forum is also a possible means to redress the difficulties arising from concurrent proceedings, and might better be considered as a matter of judicial comity, further addressed below.

26. It could be considered whether guidance or a definition of “same parties” and/or “related proceedings” could in any event be useful for the establishment of a harmonized standard in relation to concurrent proceedings.

### **Consolidation**

27. Another matter for further consideration, albeit with its own legal and logistical complexities, that might serve to reduce the frequency of parallel proceedings, is the introduction of consolidation provisions in treaty text or in arbitration rules. Such provisions would provide a legal basis for consolidation.

28. As an illustration, the United States Model Bilateral Investment Treaty (2004) provides for requests for consolidation where “two or more claims ... have a question of law or fact in common and arise out of the same events or circumstances ...” — and other solutions, such as that contemplated by the OECD Negotiating Group on Multilateral Agreement on Investment (MAI; negotiated between 1995-1998, and discontinued), the text of which provided for a provision on consolidation of multiple proceedings (article 9). In the MAI, it was suggested that a separately constituted arbitral tribunal would be empowered to determine whether to consolidate all or part of the multiple proceedings.

29. Matters to be considered in relation to the design of a consolidation regime include the question of parties’ consent to consolidation, the nature of the decision to consolidate if made by the arbitral tribunal, due process, consolidation of proceedings for parallel arbitrations arising under different treaties.

### **Coordination and exchange of information among arbitral tribunals**

30. International judicial comity is another area which may provide a mechanism for the coordination of multiple proceedings. A matter for consideration could be whether existing UNCITRAL texts, for example the Model Law on Cross-Border Insolvency (New York, 1999) (the “Insolvency Model Law”), which provides for cooperation in relation to concurrent litigation proceedings in the matter of insolvency, could provide a model for a legislative text in the field of investment arbitration.

31. The Insolvency Model Law provides for cooperation and direct communication between the courts of different countries, or courts and administering institutions in different countries, in respect of concurrent proceedings involving the same debtor (articles 25-26); rules on the commencement of a local proceeding involving the same debtor when a foreign proceeding has previously commenced (article 28); rules concerning coordination of concurrent proceedings, particularly with respect to the granting of relief (articles 29-30); rules seeking to avoid double recovery in situations where concurrent proceedings involving the same debtor are taking place in different jurisdictions (article 32); and a basic factual presumption that the existence of a foreign proceeding in relation to that debtor is proof, absent evidence to the contrary, that the debtor is insolvent (article 31). The Insolvency Model Law is premised on the notion of the same debtor being subject to insolvency proceedings in multiple



jurisdictions. Also noteworthy is the Practice Guide on Cross-Border Insolvency Cooperation which provides information for insolvency practitioners and judges on practical aspects of cooperation and communication in cross-border insolvency cases. It illustrates how the resolution of issues and conflicts that might arise in those cases could be facilitated by cross-border cooperation, in particular through the use of cross-border insolvency agreements, tailored to meet the specific needs of each case and the requirements of applicable law.

#### **Definition of investor; limiting parties with standing**

32. Commentators have suggested that investment treaties should clearly set out what level of indirect ownership is required for a shareholder to acquire standing under an investment treaty, and that such clarity could help to reduce parallel proceedings in situations where the same parties (related by control) initiate proceedings under different treaties in relation to the same State measure.

33. A matter for the consideration might be whether guidance could be developed in relation to harmonizing a standard of corporate nationality, or creating model clauses for investment treaties to clarify investor standing under a treaty.

34. The UNCITRAL Legislative Guide on Insolvency Law (the “Insolvency Guide”) observes that the laws of different jurisdictions vary in respect of the extent to which a law allows the veil of incorporation to be lifted, but that it is common for insolvency laws to address issues of intra-group liability in corporate groups on the basis of the relationship between the insolvent and related group companies in terms of both shareholding and management control (see part three, chapter I, paras. 26-30). It cites as an alternative to direct regulation of corporate groups the need to include sufficient definition in the relevant law to allow application of the relevant provisions to corporate groups, for example by establishing the subordination of “related parties”.

### **III. Concluding remarks**

35. The Commission may wish to consider whether UNCITRAL should hold a colloquium to consider further the matters highlighted in this note, including:

- The definition of the various issues at stake and whether those issues can be dealt with at a multilateral level;
- The matters to be covered in any instrument addressing concurrent proceedings;
- The form(s) such instrument(s) could take;
- The actors to be involved in the design of any possible solutions to that issue.

## C. Note by the Secretariat on possible future work in the area of public-private partnerships (PPPs) — Discussion paper — Part I

(A/CN.9/819)

[Original: English]

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## I. Introduction

1. This Colloquium on possible future work in the area of PPPs is held pursuant to a suggestion of the United Nations Commission on International Trade Law (the Commission, or UNCITRAL) made at its forty-sixth session in 2013.<sup>1</sup> Its purpose is to make recommendations to the Commission on possible future work in PPPs for the next session. This paper is provided to the Colloquium to assist it in its deliberations.

### A. Background

2. At its 2013 session, the Commission considered the report of an earlier Colloquium on possible future work in PPPs (the “2013 Colloquium”).<sup>2</sup>

3. The 2013 Colloquium reported that neither the UNCITRAL texts on Privately-financed Infrastructure Projects (the “PFIPs Instruments”),<sup>3</sup> nor other international texts on PPPs could be taken as a “de facto standard or model available to States for PPPs reform”. The Commission heard of the wide use of the PFIPs

<sup>1</sup> See Report of the Commission, A/68/17, para. 331.

<sup>2</sup> Report of the UNCITRAL colloquium on PPPs (Vienna, 2-3 May 2013), document A/CN.9/779: the conclusions are summarized in paras 73-85 (available at [www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2013.html](http://www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2013.html)). For reasons of space, this paper does not refer to specific paragraphs of the Report.

<sup>3</sup> The UNCITRAL Legislative Guide (with Legislative Recommendations) and its Model Legislative Provisions on PFIP are available at [www.uncitral.org/uncitral/uncitral\\_texts/procurement\\_infrastructure.html](http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html).

Instruments, and descriptions of developments in PPPs since they were issued, and concluded that PPPs would be amenable to harmonization and the consensual development of a legislative text. The Commission noted, however, that “the PFIPs Instruments might be in need of some updating and revision, given the development in the market for PPPs, and ... the key elements of a legislative text on PPPs — drawing in large part on the PFIPs Instruments — were agreed”.<sup>4</sup>

4. However, the Commission considered that further preparatory work would be required in order to set the scope for any mandate to develop a legislative text to be given to a Working Group. In particular, the Commission noted:

(a) A wide variation in terminology, scope and contents of existing texts at the national level; and

(b) Some divergence of views as to whether a Model Law or other legislative text on PPPs should be developed.

5. A main issue for this Colloquium, therefore, is to clarify the scope of any mandate recommended for development of a future legislative text. This clarity is required in order to demonstrate to the Commission that work towards developing a legislative text on PPPs would be ready for submission to a Working Group.<sup>5</sup>

6. The Colloquium may wish to note that the Commission will not consider whether to grant such a mandate to a Working Group in isolation; all suggestions for planned and possible future legislative development will be considered together, in order to allow the Commission to decide on its priority items. The Colloquium may wish, therefore, to comment on the importance to UNCITRAL of work on PPPs. Some relevant considerations are set out in Part II of this Paper.

## **B. Studies and consultations between the 2013 Commission session and the date of this Colloquium**

7. The Commission instructed the Secretariat to organize the preparatory work referred to above through studies, consultations with experts and a Colloquium. The preparatory work has followed the Commission’s instruction to be inclusive and transparent and multilingual to the extent possible, and to take account of the experience in all regions, including both the public and private sector.<sup>6</sup> The results of these activities are presented below.

## **II. Recommendations to this Colloquium arising from consultations and studies since the 2013 Commission session**

8. The reports of variations in existing PPPs legislation made to the 2013 Colloquium<sup>7</sup> were based on research and the experience of the participants. While there was broad agreement that this view was accurate, it was agreed in the early stages of the consultations that a systematic survey should be undertaken to provide further details of national PPPs laws. The recommendations as regards the scope of a legislative text on PPPs would then be sufficiently grounded in practice.

9. The Secretariat, volunteer experts and consultants have therefore conducted extensive surveys of existing PPPs laws to assess the extent to which existing laws

<sup>4</sup> Report of the Commission, *supra*, para. 329.

<sup>5</sup> Both the scope of a future text on PPPs and the policy issues for deliberation must be clear. The Commission is satisfied that PPPs are likely to be amenable to harmonization and the consensual development of a legislative text, that a legislative text on PPPs would enhance the law of international trade, and that proposed work would not duplicate work undertaken by other law reform bodies. *Ibid.*, paras. 328 and 329.

<sup>6</sup> Report of the Commission, *supra*, para. 330.

<sup>7</sup> See, for example, the 2013 Colloquium Discussion Paper, para. 13, document A/CN.9/782, available at [www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2013.html](http://www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2013.html), and the reports and documents cited.

reflect the main topics in the PFIPs Instruments. The surveys included reviews of PPPs laws and regulations at the national and sub-national level (both PPPs legislation and other relevant legislation), in 58 countries. The countries surveyed were selected to provide regional diversity, as well as diversity in levels of economic development and legal tradition. This review, which is considered to cover a considerable percentage of PPPs legislation worldwide, can therefore be considered representative.

10. It was reported to the 2013 Colloquium that the scope of the Model Legislative Provisions and Legislative Recommendations was narrower than the Legislative Guide.<sup>8</sup> The surveys therefore identified both existing PPPs legislation that included items beyond the scope of the Model Legislative Provisions and Legislative Recommendations, and provisions that went beyond the scope of the PFIPs Instruments as a whole.

Table 1

**List of countries surveyed**

Albania	Egypt	Malaysia	Senegal
Angola	Fiji	Mauritius	Serbia
Argentina	France	Mexico	Singapore
Australia	Guinea	Mongolia	South Africa
Benin	Côte d'Ivoire	Morocco	Republic of Korea
Brazil	Jamaica	Mozambique	Spain
Bulgaria	Jordan	Niger	Sri Lanka
Burkina Faso	Kazakhstan	Nigeria	Tanzania
Cambodia	Kenya	Paraguay	Tunisia
Cameroon	Kosovo	Peru	Uganda
Central African Republic	Kyrgyzstan	Philippines	Viet Nam
Chile	Latvia	Poland	United States of America
Colombia	Lithuania	Puerto Rico	Zambia
Croatia	Macedonia	Romania	
Czech Republic	Malawi	Russian Federation	

11. The analysis for each country's PPPs law was at a three levels:

(a) Is the main topic included in the Legislative Guide reflected in the country law (Yes/No);

(b) Are the Legislative Recommendations associated with the topic met (Yes/Partially/No);

(c) Are the Model Legislative Provisions met (Yes/Partially/No)?

12. An additional question posed was whether the country laws contained provisions in addition to those included in the PFIPs Instruments.

13. The consultants will present their detailed findings at the Colloquium, and a summary appears below.

14. The consultants report that there is a relatively high degree of reflection of the main topics of the Legislative Guide among the country laws analysed. However, compliance is significantly lower as regards the Legislative Recommendations themselves.

<sup>8</sup> See Report to the Third Session of the Team of Specialists on Public-Private Partnerships, Simmons and Simmons, available at [www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2013-papers.html](http://www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2013-papers.html).

15. The consultants also report that, in relation to the main topics contained in Sections I-VI of the Legislative Guide:

“(a) At a summary level, the main topics in Sections I-VI of the Legislative Guide were reflected in country laws 59 per cent of the time on average, ranging from 79 per cent (Section I — General and institutional framework) to 33 per cent (Section VI — Settlement of disputes);

“(b) In relation to Section III — Selection of the Private Party and Section IV — Construction and operation: legislative framework and project agreement, which account for 66 per cent of the Legislative Recommendations, the main topics were reflected in the country laws on average 63 per cent and 66 per cent of the time respectively;

“(c) In relation the Legislative Recommendations, and where the main topics in the Section were reflected in the country law, on average 58 per cent met the associated Legislative Recommendations. A further 36 per cent partially met the associated Legislative Recommendations, with 6 per cent of the sample who included the main topics failing to meet the Legislative Recommendations;

“(d) Taking the sample of 58 countries as a whole:

“(i) 36 per cent on average met the Legislative Recommendations;

“(ii) 23 per cent partially met the Legislative Recommendations;

“(iii) 41 per cent failed to meet Legislative Recommendations;

“(e) ‘In respect of Section III — Selection of the Private Party’ and ‘IV Construction and operation: legislative framework and project agreement’, which account for 66 per cent of the Legislative Recommendations:

“(i) Section III, 33 per cent of the Legislative Recommendations were met and a further 27 per cent were partially met but 40 per cent of the sample did not fully meet the Legislative Recommendations;

“(ii) Section IV, 27 per cent of the Legislative Recommendations were met and a further 34 per cent were partially met but 38 per cent of the sample did not fully meet the Legislative Recommendations;

“(f) In respect of Section VI — Settlement of disputes, 25 per cent of the Legislative Recommendations were met and a further 7 per cent were partially met but 68 per cent of the sample did not fully meet the Legislative Recommendations.”

16. The main topics for which the consultants report a higher level of non-compliance than compliance with the Legislative Recommendations are:

(a) General legislative and institutional framework: two-thirds of the countries surveyed did not reflect the Legislative Recommendations on the authority to regulate infrastructure services;

(b) Project risks and government support: over half of the countries surveyed reflected or partly reflected the Legislative Recommendations overall, but as regards guarantees provided by international financial institutions and export credit and investment promotion agencies, for which there is no Legislative Recommendation but there is guidance in the Legislative Guide, only 28 per cent included legal provisions in the national PPPs law;

(c) Selection of the private party (37 per cent of the total number of Legislative Recommendations): while the main provisions of the selection method in the Legislative Recommendations were met or partly reflected in a high proportion of the countries surveyed, a majority did not reflect the Legislative Recommendations on the record of the selection and award proceedings and on review procedures. Furthermore, exactly half did not reflect the provisions of the Legislative Recommendations on award without PPPs procedures, and only 52 per cent met or partly met those on unsolicited proposals;

(d) Construction and operation: legislative framework and project agreement: a majority did not reflect the Legislative Recommendations on security interests, assignment, transfer of controlling interest in the project company and construction works;

(e) Duration, extension and termination of the project agreement: there was a high degree of compliance in this area, though 45 per cent of countries surveyed did not meet the Legislative Recommendations on consequences of expiry or termination of the project agreement;

(f) Settlement of disputes: This section was the most poorly reflected in the countries surveyed, particularly as regards disputes other than those between the contracting entity and the private party.

17. This pattern reported was also broadly evident in the reflection of the Model Legislative Provisions in country laws. Again, the lowest level of compliance was found as regards the settlement of disputes.

18. This topic had already been flagged as one requiring revision to the PFIPs Instruments, so the consultants also considered dispute settlement provisions separately, reviewing national laws in Kyrgyzstan, Egypt, Kenya and Mongolia, the fourteen national PLC (Practical Law Company) sections on review procedures and remedies,<sup>9</sup> the PPP Guidelines of Malaysia as well as the documents found relating to PPPs in Australia, India, Japan, the Russian Federation, Turkey and Morocco. The summary findings are as follows:

(a) The treatment of review procedures and remedies in the specific context of PPP contracts is limited, but the rules applicable to public procurement aspects of PPP generally apply. To this extent, the laws of the following 14 countries are broadly consistent with Review Procedures under Chapter III of the Legislative Guide: Brazil, Canada (in addition, arbitration may be agreed as the form of dispute resolution), China (normally procurement law does not apply to PPP or concessions), the Czech Republic, the United Kingdom of Great Britain and Northern Ireland, France, Germany, Italy, the Netherlands, Poland, South Africa, Switzerland, Ukraine and the United States of America; and

(b) These country laws do not address disputes between service providers, or other commercial disputes (disputes between project promoters and between the private party and its lenders, contractors and suppliers and disputes involving customers or users of the infrastructure facility).

19. The main topics reported by the consultants are provided for in country laws but that are either not found in the PFIPs Instruments, or are covered in less detail or in different ways from the treatment in those texts, largely confirm the findings of the 2013 Colloquium. The first finding was that, while the PFIPs Instruments are a sound basis for law reform in PPPs, certain aspects of the PFIPs Instruments are in need of some updating and revision. Examples include the provision of services, unsolicited proposals, some aspects of project risk and government support, some aspects of the selection procedure, some aspects of contract management and project operation, and dispute settlement mechanisms.

20. Secondly, there appears to be increased consensus on issues for which there was previously no accepted policy solution. Examples include governance and social responsibility, the avoidance of fraud and corruption, addressing conflicts of interest, and the interaction between PPPs and other laws.

21. Thirdly, the split between the various PFIPs Instruments, and the fact that some issues are covered in more than one location in the PFIPs Instruments, indicate that a re-presentation of the guidance and provisions would enhance their readability. Examples include references to other relevant laws and financial and investment issues.

<sup>9</sup> <http://us.practicallaw.com/>.

22. Since the Commission session, the Secretariat has also engaged in consultations with experts and agencies working in PPPs reform, through exchanges of documents, teleconferences and in-person meetings, so as to complement the survey described above with the views of these experts and agencies.

23. The consultations as a whole identified a series of issues that warrant specific consideration as the key elements indicating a revision of the PFIPs text. The following section therefore considers each of the topics concerned.

### **III. Main issues for further work on PPPs**

#### **A. Scope of any future legislative text on PPPs**

24. An initial issue addressed in the consultations was the scope of any future legislative text. The Legislative Guide contains options for the types of concessions to be regulated,<sup>10</sup> but none of the PFIPs Instruments addresses the scope of an enabling law per se.

25. This issue is more complex than may be immediately apparent, partly in that there is no universal definition of PPPs. At the 2013 Colloquium, it was noted that the historically more common type of PPP is an infrastructure project with accompanying private sector delivery of associated services to the public (“infrastructure plus service PPP”), in which the operator is paid under a concession mechanism. This is the focus of the PFIPs Instruments. As also reported, however, PPPs now include the development of non-tangible infrastructure with service provision, the private provision of public services without infrastructure development, and other contractual arrangements (partnering, alliancing, some institutional PPPs, long-term leases, leasing and management contracts).<sup>11</sup> The scope of services concerned now ranges from simple to complex: for example in health-sector PPPs, from clinical services to more common facilities, cleaning and catering services.

26. A further variant of PPPs arises where a private party provides what are generally considered to be public services but that have not previously been available. Here, the authorities may subsequently seek to regulate and cooperate in the provision of the services. Reported examples of such cases include water and waste management services in Francophone Africa, and health services as described above.

27. It has also been reported to the Secretariat that private finance in infrastructure development (without associated service provision) is increasing in countries such as France, Morocco, Qatar, Tunisia, Turkey and the United Arab Emirates.

28. The surveys unsurprisingly indicate that the legislative map is highly varied, both in form and scope. Some States have public procurement and concessions laws, but no law addressing other forms of PPP; others are reported to address several forms of PPP, the lease and sale of government assets and divestments in procurement laws, though privatizations are as a rule addressed through project-specific enabling legislation.

29. In addition, the scope of existing international texts on or that may have relevance for PPPs varies: the OECD Basic Elements<sup>12</sup> include natural resource concessions (excluded from the PFIPs Instruments). The consultants report that the laws of Kenya, Kosovo and Kyrgyzstan all exclude natural resource projects.

30. At the 2013 Colloquium, it was considered that UNCITRAL should consider new types of PPPs that are not within the current scope of the PFIPs Instruments. However, the majority of the experts consulted report that the overwhelming majority

<sup>10</sup> See Chapter I, Section C.2, especially para. 19.

<sup>11</sup> See the Discussion Paper for the 2013 Colloquium, *supra*, paras. 11-12, 17-18, the reports and documents referred to therein, and the 2013 Colloquium report.

<sup>12</sup> Available at <http://ppp.worldbank.org/public-private-partnership/library/oecd-basic-elements-law-concession-agreements>.

of PPPs for the most likely users of a legislative text — developing countries and those in transition — would be infrastructure plus service PPPs, and that perhaps 20 per cent of the issues arising in these projects pose 80 per cent of the problems identified as obstructing effective PPPs.

31. The key features of infrastructure plus service PPPs are the construction and operation of the infrastructure and the delivery of the associated public services by the private sector. These elements involve an emphasis on private service provision as well as private finance; this in turn implies a shift of emphasis in the PFIPs Instruments, which do not address service provision in detail.<sup>13</sup>

32. The notion of infrastructure plus service PPPs, however, leaves considerable areas of uncertainty. First, infrastructure projects without associated services could be covered in practice by referring only to the infrastructure-relevant sections. However, there are significant differences from the projects addressed in the PFIPs Instruments, which focus on project finance as the main financial mechanism. The private investment is reimbursed through the revenue stream arising under a concession framework for the operation of the infrastructure facility.<sup>14</sup> Without service provision, the reimbursement of the private investment must come from the contracting authority, and not from users. This type of PPP is often termed “public payment PPP” or “PFI/PPP”.<sup>15</sup> In addition, there may be mixed contracts.

33. If the Colloquium considers that some or all public payment PPPs should be included in a future legislative text, it may wish to indicate additional issues that may be involved. Examples include which law will govern these transactions — would they fall within the public procurement law?<sup>16</sup> Some contractual and other implications are addressed in the section below on Funding and investment issues, and in the section on Legislation vs. contract in Part II of this paper.

34. Infrastructure PPPs without service provision generally include natural resource and agriculture concessions are infrastructure projects (broadly defined). The 2013 Colloquium report indicated a preference for excluding such projects because they involve a wide range of issues, many of which would not be relevant beyond particular projects or these sectors, and as there is existing international guidance on, for example, oil and gas and mining.<sup>17</sup> The Colloquium may wish to address this question in its report.

35. Addressing infrastructure plus service PPPs could similarly accommodate public service projects without infrastructure development, to the extent that the infrastructure-relevant provisions are not applied in relevant projects. This approach therefore accommodates the recommendation from the 2013 Colloquium that the construction of physical infrastructure should not be considered as indispensable to a future text, and recent developments in the market. The reported increase in the scope of services in services projects — such as that described for the health sector above — may indicate, however that more complex contractual provisions are required, such as greater flexibility within the contract terms to deal with both changes and other issues emerging arising from various technological factors. The Colloquium may wish to report on additional issues that such PPPs would involve if it wishes to include them in the recommended scope of any future text.

36. A further type of PPP is an “institutional PPP”, in which the project vehicle is a joint venture held between the contracting authority and a service provider. Examples

<sup>13</sup> See Chapter IV of the Legislative Guide, page 129, Recommendation 53, and Model Legislative Provision 28(h), for example.

<sup>14</sup> See, for example, Section II of the Legislative Guide, “Project risks and government support”, pp. 37-59.

<sup>15</sup> The “PFI” generally refers to the UK Private Finance Initiative.

<sup>16</sup> See, further, paras. 41 and 79.

<sup>17</sup> See, for example, (a) the publications of the Extractive Industries Transparency Initiative (EITI) at <http://eiti.org/>. EITI is an international standard that ensures transparency around countries’ natural resources, and is developed and overseen by a coalition of governments, companies, civil society, investors and international organizations; and (b) the Sector-specific toolkits of the World Bank available at <http://ppp.worldbank.org/public-private-partnership/sector>.



provided to the Secretariat include institutional PPPs in the power and health sectors. Other new PPP structures include those in which the private party is in fact a State-owned enterprise. The Colloquium may wish to consider whether there are any additional provisions that would be required if such PPPs are to be included in a future legislative text on PPPs.

37. In summary, the consultations indicated that:

(a) The concept of PPPs should be kept flexible, leading to an umbrella concept that could be subdivided, rather than a strict definition of PPPs. The main relevant concepts identified would then operate as a description of PPPs;

(b) A key element for additional regulation is the private provision of public services; and

(c) The need is for general principles that can be applied to regulate the common elements of all PPPs.

38. The consultations did not, however, reach a common position on the precise scope of the PPPs to be addressed. Here, the extent of work and likely appetite of UNCITRAL's member States for a PPPs project may be relevant. The 2013 Colloquium observed that UNCITRAL should engage in work that was feasible within a time-frame that would allow the project to meet what was considered to be "an urgent need for a more general UNCITRAL standard on PPPs".

39. In the light of this observation, the need to recommend a reasonably certain scope of work to the Commission, the tensions between trying to address all forms of PPPs and producing a text in a relatively short time-frame, the majority of the experts consulted recommended that UNCITRAL should focus its efforts on legislative development for infrastructure plus service PPPs. As a practical example of the type of choice that these resource-related issues implies, see, further, paragraphs 55-56 in the section on Cross-border PPPs, below.

40. The Colloquium may wish to set out in its report to the Commission the types of PPPs that are to be included in any future legislative text, those that are to be excluded, and those where a decision is not yet taken. It may also note that regulators of excluded forms of PPPs could draw on the core PPPs topics and guidance on them in a future UNCITRAL text (and UNCITRAL could in due course decide to address other forms of PPPs, as separate future topics).

41. A second and related issue of scope is the demarcation of public procurement, concessions and PPPs laws. The Commission has previously heard that infrastructure projects form a spectrum from public procurement, via PPPs, to privatization.<sup>18</sup> The expert consultations emphasized that clarity of scope is critical to allow for States to ensure that the law(s) applicable to each project is or are clear. Options could be to regulate all the procurement-related parts of such transactions under the public procurement law, and to enact separate laws regulating different types of projects from start to finish, with identical provisions as appropriate (e.g. as regards the planning, procurement and key service provision elements), to ensure consistency. An initial indication on this issue may assist the Commission in assessing the length and scope of any mandate to be given.

42. The Colloquium may also wish to elucidate in its report to the Commission that the initial activities in legislative development would be to map the main issues that are likely to be solvable through legislation for the PPPs concerned (including whichever of the variants above the Colloquium concludes should be addressed), based on the studies referred to above and relevant international instruments, for consideration by a Working Group. The policy solutions to these issues would draw from the research carried on to date and ongoing studies.

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<sup>18</sup> Para. 32, 2013 Colloquium discussion paper. See, also, para. 79 of this paper on potentially overlapping laws.

## B. Key topics for inclusion in a PPPs legislative text

43. As reported at the 2013 Colloquium, four main areas relevant for regulation of PPPs are the legal and regulatory environment; project planning, including the allocation of project risks and government and donor support; selection of the project partner (supplier or concessionaire); and the project agreement and project operation and management. These four areas are not precise demarcations between aspects of PPPs, but are grouped together for ease of reference and discussion in the current forum. (Should UNCITRAL take up the topic of PPPs, it may then consider it appropriate to address how best to put these areas together in a single legislative text.)

44. The following sections of this paper report on the main issues arising from the Colloquium that the expert consultations confirm should be revised or re-presented as compared with their treatment in the PFIPs Instruments as currently formulated, or that should be introduced into a PPPs legislative text as new topics. They are grouped into the four thematic areas referred to in the preceding paragraph. The consultations emphasize that these are the main issues, and are not intended to provide an exhaustive list of topics for revision.

45. Given the conclusions of the 2013 Colloquium and subsequent expert advice that the point of departure should be the PFIPs Instruments, the current treatment in the PFIPs Instruments is summarized where relevant, and recommendations are made regarding the extent to which the PFIPs Instruments should be revised and re-presented.

46. This section also highlights some further topics in the PFIPs Instruments in respect of which more minor revisions may be warranted.

### 1. The legal and regulatory environment

#### (i) Institutional framework

*Relevant Legislative Recommendations: 1, 6-8*

*MLPs: No reference*

*Legislative Guide “Administrative coordination”, Section D in Chapter I (“General legislative and institutional framework”)*

47. A robust institutional framework and related processes are well-recognized as vital to effective PPPs and to attracting investors in PPPs. The experts advise that not only are the issues concerned new to most countries, they are also substantially different in many aspects from traditional public procurement projects. They include designing the scope and evaluating the affordability of services, the use of land (perhaps involving expropriation, resettlement, etc.) and more complex contracts to reflect both the long-term nature of the project and financial and operational issues. Coordination between several ministries will be required; financial, tax and accounting aspects of most projects need to be assessed (such as contingent liabilities and other issues discussed in “Funding and investment”, below); issues of public payment, subsidies, or State guarantees will necessitate at least coordination, and in most cases an endorsement from the Ministry in charge of the finance and/or budget.

48. An appropriate and comprehensive institutional framework to plan, design, develop and manage projects, drawing on international best practices is therefore required. There are many source materials recently published on this topic, but they remain incomplete;<sup>19</sup> for example, many focus on PPP planning and preparation, transparency, and to some extent procurement.<sup>20</sup>

<sup>19</sup> See the PPIAF “Reference Guide on PPPs, 2012, available at <http://wbi.worldbank.org/wbi/Data/wbi/wbicms/files/drupal-acquia/wbi/WBIPPIAFPPReferenceGuidev11.0.pdf>.

<sup>20</sup> See for instance: PPIAF Note No. 4 “Developing a PPP framework: policies on PPP unit” (May 2012), available at [www.ppiaf.org/sites/ppiaf.org/files/documents/Note-Four-Developing-a-PPP-Framework.pdf](http://www.ppiaf.org/sites/ppiaf.org/files/documents/Note-Four-Developing-a-PPP-Framework.pdf).

49. PPPs Units, which are recommended in the Legislative Guide, have proven successful in some developed countries (e.g. in the United Kingdom, Australia and France, notably for PPP/PFI contracts and for projects at the national level). The results have been less positive in developing countries. As OECD notes, “The PPP Unit should enable authorities (e.g. line ministries) to create, manage and evaluate a PPP efficiently and effectively. This role requires that the PPP Unit have the requisite in-depth financial, legal, economic and project management skills.”<sup>21</sup>

50. In addition, and particularly in emerging economies, an efficient PPP institutional framework goes much beyond the organization and the support of a central PPP Unit. Again, according to OECD, key institutional roles and responsibilities should be clarified to address fiscal and budgeting issues, procurement aspects, auditing of PPPs, and monitoring rules and enforcement.<sup>22</sup> A holistic approach to institutions is therefore required.

51. The institutions will need to reflect core principles of independence and transparency in organization and governance; the experts advise that these have not been sufficiently addressed in existing legislation, and so should be reflected in any future legislative text on PPPs.

52. The experts therefore suggest revisions to the Legislative Guide to take account of developments in PPPs institutions, and that the scope of the Legislative Recommendations and Model Legislative Provisions should be expanded. Further details of these issues, and commentary on the implications of the consultants’ finding that the recommendations on the authority to regulate infrastructure services are not generally followed in country laws, will be provided at the Colloquium.

(ii) *Cross-border PPPs*

*No references in the PFIPs Instruments*

53. Cross-border projects (CBPPPs) have been in existence for as long as infrastructure or service projects. However, when the PFIP Instruments were prepared, little attention was given to the questions that CBPPPs raise, so the topic is not addressed in those Instruments. The consultants also report that there is no CBPPPs enabling provision in the countries surveyed. In times of globalization, increased regional cooperation, and technical development, cooperative arrangements across national borders will substantially increase in numbers. Various studies point at the significant specific positive effects of CBPPPs: in short, CBPPPs increase the level of trade, trade openness, and support broader economic growth. Examples of CBPPPs can already be found across all continents and across all areas ranging from infrastructure to tourism and space projects. Another main reason for initiating CBPPPs is the fact that some challenges cannot be tackled alone by a single country (for example financing would otherwise not be possible).

54. Although the very positive effects of CBPPPs are widely acknowledged, a wide-spread reluctance to launch CBPPPs can be noted. The most significant obstacle to CBPPPs reported is the lack of guidance to address appropriately the specific legal problems inherent to CBPPPs, which is seen as a major obstacle to unleash their acknowledged great positive potential. The experts suggest that UNCITRAL, as an international platform, would be best suited for remedying this lack of guidance. UNCITRAL could also address the legal aspects related to CBPPPs in an appropriate manner, and the experts report that experience with the PFIPs Instruments also shows that CBPPPs should be addressed in any future PPPs text.

<sup>21</sup> OECD “Principles for the public governance of Public-Private Partnerships”, available at [www.oecd.org/governance/oecdprinciplesforpublicgovernanceofpublic-privatepartnerships.htm](http://www.oecd.org/governance/oecdprinciplesforpublicgovernanceofpublic-privatepartnerships.htm), section 2.

<sup>22</sup> Ibid.

55. The experts suggest three options how such provisions on CBPPPs might be included:

(a) First the issue could be dealt with by creating a new legal regime (“regime X”) on the international level establishing new and additional regulations/provisions. These provisions should provide sufficient detail while at the same time guaranteeing the necessary flexibility and adaptability, be aligned with other existing international instruments (including UNCITRAL’s other instruments) and be coordinated with international organizations such as UNCTAD, WTO and OECD. This option would entail extensive preparatory and drafting efforts;

(b) The second option would be the development of special provisions on certain necessary basic aspects of CBPPPs combined with the introduction of guidance on how to use, adopt and adapt existing provisions already in force to the international context and aspects. UNCITRAL would therefore in essence limit itself to giving guidance on the considerations to be made when adopting the relevant provisions for CBPPPs. However, as already pointed out, also this option would need drafting efforts (regarding the necessary legal preconditions when implementing this option, especially on how to create a kind of collision and remedy regime);

(c) The third option would be a combination of option 1 (“regime X”) with option 2. As a consequence of this option a decision would have to be made as to which areas would be fully (new) regulated on the international level and in which areas a reference to existing legal regimes would be implemented.

56. Noting the vast range of considerations and legal areas involved with CBPPPs, UNCITRAL’s scarce resources, and criteria for future work and *modus operandi*, the experts advise that the implementation of the first and third policy option are too burdensome and resource intensive. The decision-process on which areas should be (newly) regulated and which not in policy option three might prove very lengthy and arduous. Therefore, the experts recommend policy option two.

(iii) *Governance and social responsibility*

*No references in the PFIPs Instruments*

57. The Rio +20 declaration called on “the private sector to engage in responsible business practices, such as those promoted by the United Nations Global Compact”.<sup>23</sup> Corporate governance principles coalesce around the idea of ensuring stronger transparency and accountability in the corporate sphere. There is a clear public interest in ensuring appropriate corporate standards of behaviour (some competitive tactics, normal in the private sector, will not be appropriate in PPPs), but how far this notion extends is not certain.

58. As PPPs are a collaboration between the public and private sectors, a proper balance between corporate governance and equivalent public standards on accountability and transparency obligations is required. For example, how should the need for due diligence be addressed, given that the project company is responsible not just to shareholders, but to a wider group of stakeholders, and has ongoing obligations of public service delivery? Due diligence in public procurement operates under well-understood rules, but the PPPs situation is more complex and less well-addressed. Also, which private sector entities are to be covered?

59. The long duration of the relationships between the partners (often multiple and changing) and the particularities related to risk distribution also require clear and adequate governance frameworks at all stages of a PPP project (decision-making, procurement, operation, termination). There may need to be rules on changes in the corporate structure to avoid the risk of all obligations being left in empty shell companies, to ensure a legal entity that will be responsible for all the obligations for the entire length of the project, and rules on equity sales may be required (construction companies, for example, will not generally wish to remain long-term shareholders). As the private partner usually has a complex organizational structure with various

<sup>23</sup> Para. 46, the future we want.

subsidiaries, associated or joint venture companies, the experts advise that it is equally important to make sure that any requirements applicable to the main contractor are also applied to these entities, and broader rules on subcontracting are needed.

60. Although PFIPs Instruments touch upon some of the issues linked to establishing clear rights of shareholders and stakeholders (creditors, employees, customers) or the organization, functions and responsibilities of boards of directors (collectively and individually), these matters need to be further explained and complemented. There is a need to protect the public authority's interest in ongoing service delivery (for which a range of widely-different tools may be available, raising complex policy issues). Future work should address potential controversies in preventing and addressing corruption, conflicts of interest, the independence of board members, directors, executives and auditors and establishment of code of conducts promoting high standard ethical behaviour. Accountability and responsible decision-making indicate improved oversight mechanisms (such as committees, units, audit and other authorities), internal control systems over boards and audits of financial statements.

61. The questions of standards on accurate and periodic disclosure of information and sufficient transparency in financial reporting and accounting relevant to governance are addressed in the section on Transparency in Part II of this paper.

62. Finally, the international community has also been increasingly involved in promoting new core values applicable to any business environment and encompassing human rights, environmental protection, long-term sustainability, anti-corruption measures, board's risk management and oversight, relationship with management and accountability to shareholders. OECD has also developed 12 principles, focused around 3 objectives, which may provide a starting-point for provisions:

- (a) Establish a clear, predictable and legitimate institutional framework supported by competent and well-resourced authorities;
- (b) Ground the selection of PPPs in value for money; and
- (c) Use the budgetary process transparently to minimize fiscal risks and ensure the integrity of the procurement process.

63. The experts recommend that the necessary requirements could be imposed through the legislative framework and/or through contractual or other mechanisms, and some consider that these should not exceed requirements on other corporations in relevant sectors to protect ongoing participation in the market. The Colloquium may wish to consider how to scope a relevant recommendation to the Commission.

(iv) *Funding and investment issues*

*Relevant Legislative Recommendation 13, "Government support"*

*MLPs: None*

*Legislative Guide: Section B.4 "Financing structures and sources of finance for infrastructure", in "Introduction and background information on PFIPs"; Section A, "General remarks", and Section C, "Government support", in Chapter II, "Project risks and government support"*

64. The PFIPs Instruments focus on the notion of project finance (that is, non-recourse lending in the sense that the investment in the project is recouped from its assets and revenue, not the lenders). However, as the Legislative Guide notes, additional security and credit are often required, including government support, so the funding is in reality limited recourse. Common sources of debt and equity financing are described in the Guide. The experts have reported an increase in initial financing from construction companies and other forms of private finance, such as pension funds. Some of the investments are designed to be short term; others, long term.

65. Assessing the fiscal sustainability of the project requires an analysis, inter alia, of the following issues:

- (a) Is the potential PPP project of a scale to justify the transaction costs?
- (b) Will the investment be repaid by the contracting authority, end users, or a mixture?
- (c) If end-user charges are levied, will demand be sufficient over the lifetime of the project?

66. The answer to the first of these questions, in addition to its relevance to whether a project should be conducted as a procurement or PPP, has raised many issues in practice. Existing PPP models have received considerable criticism for excessive transaction costs, which distort this question. They include high consortia fees and high tender costs exacerbated by lengthy selection processes, and windfall profits. Equity financing is also reported sometimes to be more expensive than debt financing, but it may have other benefits, such as if there is broad equity participation over the longer term.

67. Various Governments are promoting solutions designed to address these issues through enhancing long-term equity investment, details of which will be presented to the Colloquium. They are considered to involve tailored governance solutions (such as a legislative framework defining organizational structures, transparency, assurance, and reporting processes, rather than relying on contractual provisions); the possibility of government guarantees for rates of return to pension fund investors; and periodic fund management re-competition during the investment period.

68. In Australia, one proposed solution is a two-phase “inverted” procurement process for PPP: there is a first competitive process for equity funding to determine market appetite and set threshold rates of return, prior to the business case and procurement phase. A similar process could be set for debt financing.

69. However, it has been reported that pension funds and similar funds may not be able to invest in projects unless the project’s social/economic goals are declared and can be monitored.<sup>24</sup> In addition, without reforms to procurement processes, enhanced transparency throughout the project, and improved contract management and governance in the operation phase (discussed elsewhere in this section), they may not be willing to invest.

70. The Colloquium may wish to consider the extent to which any future legislative text on PPPs should address these issues, including as a separate topic or as part of other relevant topics.

(v) *PPPs with small-scale operators*

*No references in the PFIPs Instruments*

71. The projects for water and waste management services in Francophone Africa referred to in paragraph 26 above were concluded with small private operators. Such projects were historically considered to be outside the PPPs environment. However, as public authorities have started to organize and regulate these services in cooperation with such operators, the position has changed. As many such PPPs operate in urban situations, the services concerned can be paid through concessions — the example of Morocco was cited to the Secretariat.

72. There are benefits of such PPPs to development goals — local employment and the creation of a local private market, providing public access to essential services (waste and water collection, transport, sanitation and electricity, for example). In public procurement, policies designed to support SMEs are common (ranging from

<sup>24</sup> As regards goals and objectives, see the section on Sustainable Development issues; disclosure and confidentiality issues are addressed in the section on Transparency, both found in Part II of this paper.

process simplification to financial support). Projects with small private operators can also operate as capacity-building tools.

73. The Colloquium may wish to consider which, if any, of such projects should fall within the PPPs that UNCITRAL may address, from a policy perspective. For example, publicly-funded projects can evidently be simpler SME-support tools than those under concessions, because the funding is relatively secure, and arises under long-term contracts.

74. If these projects are to be addressed, a secondary issue is whether the regulations (e.g. selection procedures) should be relaxed to encourage small private operators. The experts' views differed on this question.

75. Other relevant issues include how to define relevant operators, ensure equity investment in those operators, design appropriate payment systems, develop capacity through regulation and/or guidance, provide appropriate institutional support, and how to allow for changes during the project period that may have a very significant impact on smaller operators.

76. The Colloquium may care to note that the Conseil d'État of France, the Agence Française de Développement and the World Bank are leading a community of practice in PPPs with small private operators. Further information on such PPPs will be provided to the Colloquium.

(vi) *Consistency between PPPs and other laws*

*Relevant Legislative Recommendations/MLPs: None*

*Legislative Guide: Section B.1(a), "Competition Policy and Monopolies", in "Introduction and background on PFIPs", and Chapter VII, "Other relevant areas of law"*

77. The importance of ensuring that the legislative framework adequately addresses other relevant laws was noted at the 2013 Colloquium. The current Legislative Guide addresses competition law and policy, and a range of other relevant laws from national laws on the promotion and protection of investment to anti-corruption measures, and relevant international agreements. The experts have advised that existing guidance requires updating, and some revision, building on the current Legislative Guide, on such matters as promotion and protection of investment (including developments in case law, business risk and perceptions); competition law; licensing law; data protection and information disclosure law (see, also, the section on Transparency in the second part of this paper). Additionally, developments in constitutional issues — such as the extent to which a project agreement should be uplifted to the status of legislation and so would override prior inconsistent laws — and in case law<sup>25</sup> are cited as requiring review.

78. The Colloquium report stressed that not all such issues are capable of legal resolution, and that a future legislative text should focus on legislative solutions.

79. The Colloquium may wish to consider how to provide appropriate guidance to support any future legislative text. For example, the Guide to Enactment accompanying the Model Law on Public Procurement sets out other relevant laws to assist in the implementation and use of the Model Law;<sup>26</sup> UNCITRAL has also published a paper on procurement regulations, which explains how the Model Law may be supplemented by such regulations.<sup>27</sup> In the PPPs context, an equivalent approach could draw attention to potentially overlapping laws to avoid conflicts

<sup>25</sup> The Experts referred to cases at ICSID ([https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases\\_Home](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home)) and the many cases relating to the Eurotunnel project.

<sup>26</sup> Para. 61, in Section C, "Implementation and use of the Model Law ...".

<sup>27</sup> Document A/CN.9/770, available at [http://uncitral.org/uncitral/uncitral\\_texts/procurement\\_infrastructure.html](http://uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html).

(existing procurement and/or concessions laws; privatization laws, the laws referred to in the existing Legislative Guide, and sector-specific regulation).<sup>28</sup>

80. The Commission may also wish to consider two related topics, arising out of the United Nations Convention Against Corruption (UNCAC),<sup>29</sup> which the experts advise are out-of-date in the PFIPs Instruments.

(a) *Anti-corruption and integrity measures*

*Relevant Legislative Recommendations/MLPs: None*

*Legislative Guide: “Promotion of the integrity of and confidence in the selection process”, “Transparency of laws and procedures”, Items 2(b) and (c) in Chapter III, (in “General objectives of the selection process”; “Anti-corruption measures”, Item B.14 in Chapter VII (in “Other relevant areas of law”))*

81. UNCAC came into force after the issue of the PFIPs Instruments and so was not taken into account when the latter were drafted. It contains provisions relevant to PPPs in article 9 (“Public procurement and management of public finances”) and article 12 (“Private Sector”).

82. The Legislative Guide notes the importance of integrity measures and appropriate rules for government contracts, outlines some key elements, and refers the reader to international texts pre-dating UNCAC as sources for relevant provisions. At the 2013 Colloquium, it was noted that more emphasis was needed on transparency and accountability measures throughout the project, public disclosure of resource transfer from the public to the private sector and vice versa, and on media for communications and meetings.

83. The 2013 Colloquium noted that the Model Law on Public Procurement was drafted specifically to comply with UNCAC, and underscored the importance of consistency between the Model Law and any future PPP text as regards integrity measures.

84. The UNCAC requirements for the management of public finances include procedures for the adoption of the national budget; timely reporting on revenue and expenditure; accounting, auditing and oversight; risk management and internal control systems; and measures to preserve the integrity of relevant documentation. These requirements, set out in the Technical Guide to UNCAC regarding article 9,<sup>30</sup> are supplemented by requirements in article 10 for public reporting and transparency (access to information concerning public administration and periodic public reporting) and in article 12 for measures to prevent corruption involving the private sector, referring specifically to PPPs and corporate governance.

85. OECD has issued a series of relevant publications that can assist in crafting relevant standards. The Principles for the Public Governance of PPPs referred to above set out the need for a clear, predictable, legitimate and appropriately resourced institutional framework — involving public awareness through consultations of the relative costs, benefits and risks of PPPs and public procurement; the need to maintain key institutional roles and responsibilities (to ensure prudent procurement process and clear lines of accountability); and the need for regulation to be clear, transparent, enforced and not excessive. They also discuss the need for a transparent budgetary process to minimize fiscal risks and ensure integrity of the procurement process in PPPs, with disclosure of all costs and contingent liabilities and the need to ensure the integrity of the procurement process, and refer to other OECD reference tools.<sup>31</sup>

<sup>28</sup> See, also, para. 41 on potentially overlapping laws.

<sup>29</sup> United Nations, *Treaty Series*, vol. 2349. Also available at [www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf).

<sup>30</sup> Available at [www.unodc.org/documents/corruption/Technical\\_Guide\\_UNCAC.pdf](http://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf).

<sup>31</sup> See, further, a discussion handout for the preparation of the Principles — available at [www.oecd.org/gov/budgeting/48144872.pdf](http://www.oecd.org/gov/budgeting/48144872.pdf).



86. The Colloquium may therefore be of the view that the PFIPs Instruments require revision to comply with prevailing international standards, drawing on the above texts.

*(b) Conflicts of interest*

*Relevant Legislative Recommendations/MLPs: None*

*Legislative Guide: “Institutional Mechanisms”, Item E.2 in Chapter I (in “Authority to regulate infrastructure Services”) (paras. 37, 38 and 47); “Choice of subcontractors”, Item 1(a) in Chapter IV (in “General contractual arrangements”) (para. 101); “Company law”, Item B.8 in Chapter VII (in “Other relevant areas of law”) (para. 32)*

87. Related to the preceding topic is that of conflicts of interest. PPPs are often complex: many stakeholders, complex financing schemes, different traditions and usages, long-term duration, the public nature of the services provided by the project, and disputes of varying and complex nature.

88. Such projects involve a multitude of parties and public entities: the Government or a public authority, a concessionaire or contracting private party, a legal entity established by the private side with separate legal personality (a special purpose vehicle — “SPV”), sponsors, lenders — institutional and others — capital markets, advisers, insurers, an operator, contractors, suppliers, users, and supervising authorities.

89. The structure of PPPs has an inherent potential for conflicts of interest. PPPs typically involve the same parties in various capacities. The sponsors are typically owners of the project and often also contractors or suppliers to the project. The primary interest of the sponsors as contractors or suppliers are in most cases to build the infrastructure of the project or to provide goods or services to the project. In their capacity as sponsors, they will control the SPV and its contractors and suppliers, which could entail a preference for the position of the contractors or suppliers. Typically, directors and managers of the SPV are employees of the sponsors and subordinate to officers of the sponsors. When the Government becomes part of the group of owners, its interest is the public interests and not primarily the interests of the SPV, and the representatives of the Government involved in the management of the SPV have the role of safeguarding the interest of the Government. Also, the Government may have many other roles: tax collector, regulator, project supervisor, financier, service provider, owner of assets needed for the project and of competing providers of goods and services, etc. Also financiers will have a controlling role which in project finance structures is very strong, in particular over project cash flows.

90. Many situations will arise where the interest of the various participants collide. Such cases of conflicts may arise regarding the use of cash flow and profits, when there are disputes between or among project participants, regarding quality of the construction, goods or services, etc.

91. It seems as if the problems connected to conflicts of interest have attracted little attention, maybe because they are not understood or that some participants are inclined to benefit from this. These problems have only sporadically been addressed in the Legislative Guide on Privately Financed Infrastructure Projects and not at all in the Legislative Provisions. In addition to a brief reference to the issues relating to the sponsors of the SPV set out above, the Legislative Guide simply recommends provisions on conflicts of interest for staff of regulatory agencies and for staff of the contracting authority during the selection process, and that contractors disclose potential subcontractors to identify possible conflicts.

92. It is therefore proposed that conflicts of interest should be included in work to develop a future legislative text on PPPs, drawing on (among other things) the requirements for Codes of Conduct under Article 8 of UNCAC, the requirements under Article 9(1)(e) of that Convention for measures to regulate personnel responsible for procurement, and the reflection of those provisions in article 26 of the UNCITRAL Model Law on Public Procurement and accompanying Guide to

Enactment, and possibly on provisions dealing with conflicts of interest in the concession award procedures in a proposed directive on concessions in the European Union. These measures may include declarations of interest, screening procedures and training requirements, and contractual arrangements.

*[This paper continues in document A/CN.9/820]*

**D. Note by the Secretariat on possible future work in the area of  
public-private partnerships (PPPs) — Discussion paper — Part II**

**(A/CN.9/820)**

**[Original: English]**

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**III. Main issues for further work on PPPs (*continued*)**

**B. Key topics for inclusion in a PPPs legislative text (*continued*)**

**2. Project planning, including the allocation of risk and government support**

*(i) Project planning and preparation*

*Relevant Legislative Recommendations, MLPs: none*

*Legislative Guide: Section D.1, “Co-ordination of preparatory measures”, in Chapter I, “General Legislative and Institutional Framework”*

1. The PFIPs Instruments provide general guidance on project planning and preparation, outlining important elements of good practice and emphasising in particular the importance of feasibility studies. The guidance stresses that the latter should include “economic and financial aspects such as expected economic

advantages of the project, estimated cost and potential revenue anticipated from the operation of the infrastructure facility and the environmental impact of the project”.<sup>1</sup>

2. The experts advise that these provisions are, however, insufficient, given the evidence of unacceptable rates of failure in PPPs in developing countries (estimated to exceed 50 per cent after only 2 years of project operation). They note that the costs of effective planning and preparation are not adequately accounted for in government budgets and many countries do not evaluate such costs prior to commencing a project. They add that an estimated US\$ 1 billion is needed for annual preparation costs for all World Bank PPPs in Africa, of which most should be applied towards feasibility studies, but in practice under US\$ 50 million is spent on such studies. Moreover, the expenditure is applied in an uneven manner, without coordination among the many sectors involved. The situation is reported to be compounded by poor governance and vested interests. Practitioners cite the lack of an appropriate framework for project planning and project preparation as one of major weaknesses of PPP institutional frameworks (addressed in Part I of this paper) and PPP laws generally. Hence the experts consider that a more detailed and prescriptive approach is needed in any future legislative text on PPPs.

3. The experts also advise that savings from avoiding project failure would far outweigh the costs of good planning and preparation, and that the experience of the international financial institutions and practitioners in planning and preparation policies at the national and international levels could be harmonized and aggregated to a large extent. Lessons learned from this experience and that of related working groups<sup>2</sup> could help formalize good practices applicable to all forms of PPPs and to all parties to them, and standards and guidance that could be applied widely.

4. The planning and preparation steps that could be addressed include: (1) Development of a (medium-term) master plan for infrastructure development, including the provision of public services; (2) Consequential prioritization of projects based on socioeconomic objectives and considerations, financial implications, effects on sustainable development, and so on; (3) Plans for each project, to address choice of project type, based on financial and other capacity of a State or a contracting authority (traditional procurement, Design & Build, PFI/PPP, concession-type PPP); (4) Planned market assessments for each project; and (5) Evaluation by various actors of individual projects in accordance with established standards, including transparency requirements, reflecting the type of project concerned.

5. It was also suggested that plans should be published so that whether the desired socioeconomic outcomes are realized and whether the financial assessments underlying the choice of project type prove accurate can be evaluated in a transparent manner. These issues are also discussed in the sections on Transparency and Other issues, below.

6. The experts also note that more recent PPPs laws include provisions on selection, prioritization and development of projects, though there is some anecdotal evidence that these provisions are sometimes seen as a barrier to developing projects (and so contracting agencies may seek to circumvent them and to engage in non-competitive selection procedures). In addition, the importance of an infrastructure plan as noted above may assist in addressing some aspects of unsolicited proposals, as further explored in the section on that topic, below.

7. The experts advise that the recommendations in the Legislative Guide on ensuring that the relevant bodies are adequately-resourced and enabled to coordinate as appropriate on due diligence matters and financial preparation should also serve as a basis for further provision in any future legislative text on PPPs. The scope and functions of relevant institutions discussed in Part I of this paper will be a relevant consideration in this context.

<sup>1</sup> Legislative Guide, para. 25, Section D.1, “Co-ordination of preparatory measures”, in Chapter I, “General Legislative and Institutional Framework”.

<sup>2</sup> Such as the Public-Private Infrastructure Advisory Facility (PPIAF), [www.ppiaf.org/](http://www.ppiaf.org/).

*(ii) Risk allocation**Relevant Legislative Recommendation 12*

*MLPs: none*

*Legislative Guide: Section B, “Project risks and risk allocation”, in Chapter II, “Project risks and government support”*

8. The 2013 Colloquium heard suggestions that the question of risk allocation should be afforded greater detail in any future text on PPPs, that there was too little flexibility on the topic so far as the private sector is concerned in many PPPs laws,<sup>3</sup> and that the Legislative Guide provides inadequate guidance on some aspects of the topic.

9. The Legislative Guide describes the various categories of project risk affecting the various parties to and stakeholders in the project, and recommends as a general principle that the party most able to prevent a risk from occurring, to bear its costs or consequences and/or to take mitigating steps should bear and manage the risk. This principle is broadly followed in other international texts on PPPs (and in the OECD Principles for the public governance of PPPs referred to above).

10. The experts suggest that certain risks — such as demand risk and public affordability risk — cannot easily be identified, defined and measured, and that the parties to a PPP may characterize some risks differently. The Legislative Guide also notes that some risks are endogenous to one party to a PPP only, and some are in no party’s control and so cannot be managed by any party (i.e., exogenous to all parties). Hence, special arrangements for them need to be addressed in the project agreement. An example of these exogenous risks, noted by the OECD, is an uninsurable force majeure risk, such as the risk of conflict.

11. The negotiation of the project agreement and related documents will therefore be a critical factor to ensure the appropriate allocation of risk, especially where risks are difficult to define, etc., and where there are disagreements over their characterization. Risk valuation is complex, and the price paid for risk transfer in these cases will be particularly difficult to agree (and it may be a key determinant of whether a PPP eventually gives value for money). The experts suggest that stricter requirements for more thorough feasibility studies and other project planning issues may assist in better identification, definition and measurement of risks, would ease the negotiation process and therefore should be required in any future legislative text on PPPs. In addition, they recommend a more articulate link between feasibility studies and risk assessment.

12. The experts also recommend that Legislative Recommendation 12 (on risk allocation) be considered specifically when addressing the balance of contract terms in legislation and contracts (discussed in the section on this topic below), and that methods of apportionment of risks that materialize should be included in contract terms. From a public policy perspective, it is suggested that guidance should be more robust on the negative implications for the public interest where risks are in theory transferred to the private sector, though an unstated assumption that they may ultimately be borne by the contracting authority. This situation may arise if some consequences, such as service interruption, cannot be permitted to materialize in practice.

13. It has also been noted that the public sector can in some cases self-insure against risk through pooling risks that may arise in its widespread operations. In such cases, explicitly identifying and paying for specific risks may be regarded as contrary to the public interest.<sup>4</sup> The experts suggest that the issues in this and the preceding paragraph require further development in any future text, drawing on the various sources identified.

<sup>3</sup> See, also, section 3.5.1 of the Simmons and Simmons report, footnote 8 in Part I of this Discussion Paper, A/CN.9/819.

<sup>4</sup> See “PPP – A Decision-maker’s Guide”, Michael Burnett, EIPA, 2001, page 57.

14. Government guarantees and other forms of support to mitigate risks (e.g. compensating those affected when a risk arises, stabilization clauses) are discussed in the Legislative Guide, together with certain policy considerations. Here, too, the experts suggest that further elaboration is required in any future text on PPPs, considering, for example, whether support should be provided in respect of risks affecting the project specifically and whether such support should not be permitted to cover risks affecting the economy as a whole. Again, they recommend that the provisions and guidance should be expressly linked to project planning.

### **3. Selection of the project partner**

#### *(i) Selection procedures*

*Relevant Legislative Recommendations: 18-39*

*MLPs: 5-27*

*Legislative Guide: Chapter III, "Selection of the concessionaire"*

15. The 2013 Colloquium heard that the main steps in the selection of the project operator are pre-selection, participation of consortia, methods and techniques (single-stage, two-stage, single-source, negotiations); comparison and evaluation of proposals; contract award notices; and record-keeping. These steps are conducted under fairness, transparency and competition as guiding principles; and are subject to review or challenge (this aspect is discussed in the following section). These steps and principles reflect the requirements of UNCAC.

16. It has been acknowledged that traditional tendering procedures are generally not appropriate for PPPs. The 2013 Colloquium also heard that the UNCITRAL Model Law on Public Procurement included what is in essence an updated and complete form of the selection procedure in the PFIPs Instruments. The method concerned is called Request for Proposals with Dialogue, and it is available for the procurement of complex items and services (such as infrastructure projects).

17. Each of the PFIPs Instruments contains detailed provisions on the selection procedure, and the Colloquium may consider that the provisions concerned should be consolidated for the ease of the reader, in addition to being updated to reflect the provisions on Request for Proposals with Dialogue method in the Model Law on Public Procurement.

18. This method envisages a two-step process, designed to allow for innovative solutions to technical issues, to encourage sustainable procurement, and to provide for infrastructure needs. It allows for different technical solutions to be proposed, and for interaction between the parties on technical, legal and financial issues. However, it does not address all procurement-related issues that may be relevant to PPPs projects. Key additional issues revolve around the need to define, secure and evaluate the provision of services as well as to contract for construction, how to allow for value for money assessments involving performance measurement over the project lifetime, how to accommodate the interest of stakeholders in service provision, and to address more complex negotiations than arise in public procurement — among a broader group of parties to the project, including lenders.

19. At the more detailed level, some obligations that are relatively flexible for public procurement may require further elaboration in any future legislative text on PPPs. They include the extent of disclosure of the proposed procurement contract at the solicitation stage and the need to finalize the project agreement after selection of the project operator (negotiations on the procurement contract are prohibited in the Model Law, but are contemplated in the Legislative Guide and MLP 17). The experts advise that these issues will need to be addressed in conjunction with a consideration of the contents of the project agreement (as to which, see the section on Provision in legislation or contract, below), and the extent to which amendments to contracts and step-in arrangements for the project may imply reopening competition or may involve other aspects of the procurement process. The solutions designed to allow for transparency throughout the project discussed in the sections on Procurement

Planning and Preparation above and on Transparency below may also need to be brought into the picture, such as the public declaration of the goals and objectives of the project (including stakeholder benefits), so as to allow for accountability for delivery of services as well as physical construction.

20. The 2013 Colloquium agreed that any future text on PPPs should be based on the above procurement method, so as to ensure consistency in procedures and safeguards in projects whether publicly- or privately-funded. The Colloquium may wish to include in its report to the Commission its views on this topic.

(ii) *Domestic preferences*

*Relevant Legislative Recommendation/MLPs: none*

*Legislative Guide: Section B.4, "Pre-selection and domestic preferences", in Chapter III, "Selection of the concessionaire"*

21. The Legislative Guide provides outline guidance on domestic preferences, noting that although many States seek to use them, such preferences give rise to many policy issues. In addition, the Legislative Guide notes that their use may be constrained by international commitments of the enacting State, and refers to the provisions in the 1994 UNCITRAL Model Law on public procurement and accompanying commentary on margins of preference. The experts note that the main reasons governments seek to use domestic preferences are to pursue their socioeconomic policy objectives, and more generally to support development goals (the link between those goals and PPPs is discussed further below, in the section on the Importance of possible future work on PPPs). In addition, domestic preferences may be an important tool for supporting PPPs with small private operators, discussed in Part I of this paper.

22. The current (2011) Model Law on Public Procurement and Guide to Enactment contain provisions on and extensive discussion of preferences and other tools that States may use to pursue these socioeconomic policy goals. Flexibility to use the tools is given to the extent that international obligations, such as those arising under the WTO Agreement on Government Procurement permit and when procuring using loans from international donors. The measures include robust transparency mechanisms, designed to ensure that potential participants in the process will understand how the goals will be implemented in the procedure, which may be in any of four stages: when deciding to limit a procurement to domestic suppliers, and when examining qualification, responsiveness and evaluating tenders. The provisions are also designed to enable States to implement sustainable procurement, using the practical tools developed by other donor agencies (such as the United Nations Environment Programme, the OECD, and others) and to allow for any mandatory requirements imposed in an individual State (such as regards environmental criteria).

23. The Colloquium may consider that any future legislative text on PPPs should follow this approach, though noting that its application in the PPPs environment is considerably more complicated than is the case in public procurement. For example, applying a domestic preference to predominantly non-price evaluation criteria and service provision is extremely difficult. In addition, the experts advise that amplified guidance will be required in the PPPs context, given the public service obligations and their implications for all phases of the project cycle, and that it should provide clear examples such as how to use social clauses and other measures promoting social responsibility and pro-poor projects.

(iii) *Review and challenge mechanisms*

*Relevant Legislative Recommendation: 39*

*MLPs: 27*

*Legislative Guide: Section I, "Review procedures", in Chapter III, "Selection of the concessionaire"*

24. The PFIPs Instruments contain outline recommendations on review and challenge mechanisms, i.e. disputes arising out of the selection process in PPPs (separate to post-award disputes, which are addressed in the section on that topic below). Such mechanisms were noted at the 2013 Colloquium as examples of areas of PPPs regulation that would be suitable for harmonization with public procurement laws, being equally applicable in the public procurement and PPPs contexts.

25. The Model Law on Public Procurement contains a chapter with comprehensive provisions on review and challenges, implementing the core principles set out in the PFIPs Instruments. They allow three types of challenges (challenges presented to the procuring entity, and/or to an independent body and/or to the judicial authorities). The chapter also provides remedies available to aggrieved suppliers.

26. The provisions are drafted flexibly, so need to be tailored to suit the enacting State's legal system, as explained in the accompanying Guide to Enactment. They are sufficiently broad to allow investors and other parties to a PPP to use the mechanisms concerned. The chapter was designed to implement the requirements of UNCAC on review and appeals mechanisms, including a requirement for an appeal against first-instance challenge decisions.

27. The Colloquium may therefore consider that a provision allowing parties to a PPP to avail themselves of the procurement challenge mechanism should be included in any future PPPs text.

(iv) *Unsolicited proposals*

*References: Leg Recs: Recommendations 30-35*

*MLPs: Provisions 20-23*

*Guide: Chapter III, Section E: "Unsolicited proposals", paras. 97-117*

28. The experts advise that unsolicited proposals are controversial issues in most countries and that there are few examples in the last decade of projects having been satisfactorily developed as a result of unsolicited proposals.

29. They also note that, in infrastructure plus service PPPs, the scope for taking up unsolicited proposals should be limited by reference to the current guidance in the PFIPs Instruments. In summary, those provisions — which the experts consider as representing best practice — state that unsolicited proposals claiming to involve the use of new concepts or technologies may be taken up, but those claiming to address an unidentified infrastructure need should not. The reasons justifying the latter exclusion include that the contracting authority would be unable to assess whether its needs would be met appropriately, and that the affordability of other projects included in an investment plan may be compromised (see, also, the section above on Project planning and preparation).

30. The experts note that the mere fact that an unsolicited proposal may be in the public interest (i.e., it meets a previously unidentified need) is not sufficient to permit direct negotiations without competition. They further advise that additional provision is required to address whether unsolicited proposals could ever be acceptable without any form of competition.

31. The PFIPs Instruments also provide that where the subject of an unsolicited proposal is considered to be a project in the public interest, but is not proposing new concepts or technologies, or is not protected by intellectual property or similar rights, it may proceed with the caveat that the contracting authority should initiate the normal competitive selection procedures. Here, however, recent experience indicates that a



proposal that falls outside a government's infrastructure plan and consequential budgeting arrangements should not generally be considered in the public interest: special circumstances would need to exist before it may be further considered.

32. In addition, the experts agree with the Legislative Guide's recommendations that the normal selection procedures may require some modification in cases in which the proposals contain new concepts or technologies. For example, the contracting authority may publish a description of the essential output elements of the proposal, seeking competing proposals. The experts add that this procedure could include dialogue (in the sense of the procurement method described in the section on Selection procedures above), including some provision for a premium to be paid to the original proponent if it is selected. The experts note that this process is not simple, even given existing guidance on the operation of this approach,<sup>5</sup> and that the current provisions require some strengthening.

33. If an unsolicited proposal involves exclusive intellectual property rights, the current provisions allow the authority to negotiate directly with the proponent, though a general recommendation to seek to introduce competition, to the extent possible, is made. The experts note that, if the proposal is for a PFI/PPP, procurement laws on the procedure may apply, though they would normally permit direct negotiations (potential overlaps between procurement and PPPs laws are discussed in Part I of this paper). The experts add that further detail is required on this type of unsolicited proposal.

34. The experts conclude that, after a decade of experience, the provisions of the PFIPs Instruments overall on this topic have proven to be fair and robust. They do not recommend any fundamental amendments, but a consolidation and some strengthening of the provisions in the three instruments, updating them as necessary to reflect developments in practice. In addition to the issues mentioned above, these developments include further procedures on identifying whether a proposal is in the public interest and is "unique" in the sense of proposing new concepts or technologies, including institutional checks and balances. As regards procedures for handling unsolicited proposals, issues such as Swiss challenges, allowing the original proponent a bid premium, reimbursement of the costs of developing the original proposal (or funding the original proponent to conduct a selection procedure) may also be addressed in any future text.

#### **4. The project agreement and operation**

##### *(i) Provision in legislation or contract*

*Main relevant Legislative Recommendations: 12, 40*

*MLPs: Provision 28*

*Legislative Guide: Section A, "General provisions of the project agreement", in Chapter IV, "Construction and operation of infrastructure: legislative framework and the project agreement"*

35. Legal certainty is recognized as a prerequisite for securing investment in PPPs. The PFIPs Instruments set out suggested contents of the project agreement, and note that the extent to which contents of the agreement are prescribed by law varies among States. Points in favour of legislative provision include consistency and reducing the scope and length of negotiations, and those in favour of contractual provision include flexibility in negotiations.

36. The experts differ on where the appropriate balance between these approaches may be. However, they agree that legal systems generally view freedom of contract as both critical for commercial transactions and in need of limitation to protect the weaker party to those transactions and the public interest. Such limitations have been in place for many decades. Examples include limitation of liability clauses by a

<sup>5</sup> See, for example, the "Competitive Dialogue Charter, IGD January 2007, available at [www.fondation-igd.org/files/pdf/The%20Competitive%20Dialogue%20Charter%20%204.pdf](http://www.fondation-igd.org/files/pdf/The%20Competitive%20Dialogue%20Charter%20%204.pdf), and Chapter V in the Guide to Enactment of the UNCITRAL Model Law on Public Procurement.

defaulting party, consumer protection (an expanding area of law in Europe, for example, and one that may include protecting the end user of a public service), limitations on privatization and on full property rights through compulsory purchase schemes. Such provisions are found in common and civil law systems, whether or not contract law is codified, and whether or not there is a separate body of law governing public-private contractual agreements.

37. It is generally recognized that prescriptive underlying legal principles, established in advance and disseminated to all players, and key principles for contract interpretation are essential for the success of most PPPs.<sup>6</sup> The long-term nature of PPPs requires contractual provision on issues ranging from the right of the contracting authority to amend the contract terms or to terminate the contract, to the provision of compensation for exceptional economic circumstances and mandatory exceptional procedures if the public service is disrupted. The main characteristics of a public service and its scope are sometimes a major issue (examples: tariff setting, non-discrimination, continuity, adaptation).

38. On the other hand, the risk of unnecessary contractual restriction is acknowledged, though it is tempered with the notion that parties to PPPs must always be able to justify that their agreement is able to meet the interest of society and the public interest at large. Such a notion is sometime referred to as a “social licence to operate” (for example, in the mining industry).<sup>7</sup>

39. Proposed solutions therefore vary, in part reflecting the different considerations in concession-type PPPs and PFI/PPP. In concession-type PPPs, poor experience in developing countries in particular indicates that there are no easy and simple negotiations: many terms, essential for the long term success of the venture, also conflict with the contract law and with the legal culture of the contracting authority. In PFI/PPP, on the other hand, the financial aspects of the project indicate that there is less need for a large range of prescriptive or interpretative public contract law provisions for the long-term success of those projects, though only to the extent that the investment climate and investment protection regulations meet certain standards.

40. The experts advise that the PFIPs Instruments contain many elements that could form the basis of legislative provisions on contractual terms: examples include Legislative Recommendations and MLPs on obligations of the concessionaire, duration and extension of the contract, compensation for changes in legislation, amendments to the contract, termination by the contracting authority, on collection and revisions of tariffs, handling and transferring assets, transfers of controlling interests and so on. Although additional provisions would be required, there is sufficient material from the PFIPs Instruments and practice to identify principles of more or less universal nature for the success of PPPs, representing a very substantial proportion of all contractual rights and obligations in any sustainable PPP agreement.

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<sup>6</sup> See, e.g., “A new approach to public private partnerships”, HM Treasury, United Kingdom, December 2012; available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/205112/pf2\\_infrastructure\\_new\\_approach\\_to\\_public\\_private\\_partnerships\\_051212.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/205112/pf2_infrastructure_new_approach_to_public_private_partnerships_051212.pdf). “Infrastructure productivity: How to save \$1 trillion a year”, McKinsey Global Institute, January 2013, available at [www.mckinsey.com/insights/engineering\\_construction/infrastructure\\_productivity](http://www.mckinsey.com/insights/engineering_construction/infrastructure_productivity), which stresses the important potential for pension funds to finance public infrastructure projects and PPPs if appropriate legal framework and good practices are in place.

<sup>7</sup> See, for example, “Conflict and Coexistence in the Extractive Industries”, Chatham House, November 2013, available at [www.chathamhouse.org/publications/papers/view/195670](http://www.chathamhouse.org/publications/papers/view/195670).

(ii) *Post-award disputes*<sup>8</sup>

*References: Legislative Recommendations 69-71*

*MLPs: Provisions 49, 50 and 51*

*Legislative Guide: Item E.6, "Recourse against decisions of the regulatory agency", in chapter I, "General Legislative and Institutional Framework"; Chapter VI: Settlement of Disputes*

41. The question of dispute resolution was noted as an issue by the Commission in 2012, and the Commission also heard a recommendation UNCITRAL should develop a national system for dispute prevention and settlement, building on the provisions in Chapter VI of the Legislative Guide, and considering the appropriate forum. The Commission noted that further work on dispute resolution should follow the suggestions made at the 2007 UNCITRAL congress entitled "Modern Law for Global Commerce" (Vienna, 9-12 July 2007).<sup>9</sup>

42. Key recommendations made at that Congress included the development of local capacity to handle PPP disputes, and the development of a model law to include dispute resolution and preventive mechanisms. Prevention of disputes would also be supported by providing an opportunity to investors to comment on the development of rules and regulations that were applicable to them.

43. The PFIPs Instruments recommend that disputes between the contracting authority and concessionaire be settled in the project agreement; that a mechanism be established to address customers' and users' complaints, and that the concessionaire and other parties to a project should be free to choose their dispute settlement mechanism.

44. At the Congress, it was noted that the above recommendations and the guidance in the Legislative Guide are insufficient to address the many kinds of disputes that can arise in PPPs. The structure of PPPs set out in the Section on Conflicts of interest in Part I of this paper leads to a multiplicity of legal agreements, many of which are interrelated: from project agreements, shareholding/sponsor agreements, to various loan agreements, agreements relating to the design, construction and operation of a facility, consortium and subcontracting agreements and so on.

45. The 2013 Colloquium report also noted that the PFIPs Instruments were not sufficient to address these different clusters of agreements in a PPP. It emphasized that the resultant complexity of legal relationships provides significant potential for disputes, which can flow from one agreement to another. Examples of disputes that were considered not to be adequately addressed in PFIPs Instruments include regulator-operator disputes, and those between the SPV, its contractors and subcontractors (e.g. on design and construction elements). Such disputes could arise, in the post-award period, relating to the conclusion of project agreement and related agreements; the construction phase; the operation phase; and termination of the project.

46. The PFIPs Instruments were also considered as inadequately addressing the complexity of resolution mechanisms for disputes in PPPs: they do not emphasize adequately the crucial role of the governing law (and the choice of law during project formation), arbitration rules and dispute resolution forum, and their interaction.

47. The 2013 Colloquium, noting suboptimal outcomes in international arbitration, also urged a better balance in treating international arbitration and domestic dispute resolution. Multiple investment treaties, multiple international arbitration forums, cases and rulings and the poor enforcement of international arbitral awards were noted as key concerns. Building local capacity for local dispute resolution, it was stated, should be a focus in the PFIPs instruments. At the Congress, and subsequently, experts have advised the Secretariat that the increase in some forms of arbitration involving

<sup>8</sup> For disputes arising in the pre-award period, see the section on Review and challenge mechanisms.

<sup>9</sup> See the Proceedings of the Congress, chapter V; available from [www.uncitral.org/pdf/english/congress/09-83930\\_Ebook.pdf](http://www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf).

Governments should be reflected in a legislative text on PPPs; noting, however, concerns that some States prohibit arbitration involving the State as a sovereign entity, and the relationship between any PPPs mechanism and investment regulation would need to be taken into account.

48. At the Congress, it was suggested that legislation for a “sound national regime for the prevention and resolution of disputes between regulator and operator” was needed. Although the essence of such a regime would build on the PFIPs Instruments, it was considered that the Legislative Guide focused on the mechanics of dispute resolution in an “abstract” way, and that the role of regulation in dispute prevention and resolution was underplayed.

49. Subsequently, and taking account of the above points, the suggestion has been expanded to state that such a regime for all elements of PPPs is required. Particular areas to this end, raised at the 2013 Colloquium, include: (a) Ensuring the necessary experience, skills and expertise of the judiciary to address complex issues in PPPs; (b) Addressing inefficiencies in court systems; (c) Addressing lack of independence; (d) Providing for effective accessibility (procedures may discriminate against foreign investors as opposed to national entities); and (e) Ensuring effective domestic enforcement of international decisions. The need for a settlement mechanism was referred to at the Congress and included as a relevant issue during the expert consultations prior to this forum. The Colloquium may consider that lessons from those States that have set up special fora to hear disputes should be taken into account (such experience being reported to the Secretariat as, at best, mixed).

50. A related aim of such a regime would be to avoid conflicting decisions and other issues arising out of parallel and concurrent disputes, so decisions by the body envisaged would need to bind all relevant parties and hence all interested parties should be able to participate. Conflicts of interest arising during proceedings, given the multiplicity of parties, would need to be addressed; ensuring independence in appointments to, the operation of, and appropriate standards of conduct within the entity likewise.

51. The Congress heard that model legislative provisions and/or legislative guidance should be considered by UNCITRAL to address these issues; the Colloquium may wish to consider those aspects that could be included in any future legislative text on PPPs.

## 5. Other topics

### (i) Transparency

*References: Legislative Recommendation 1*

*MLPs: Provision 1*

*Legislative Guide: Item A, “Introduction”, in “Introduction and background information on privately-financed infrastructure projects”; Item B.1(a), “Transparency”, Item D.2, “Arrangements for facilitating the issuance of licences and permits”, Item E.5, “Regulatory process and procedures”, all in Chapter I, “General Legislative and institutional framework”; Chapter III, “Selection of the concessionaire”; Item B, “Organization of the concessionaire”, Item G, “Transfer of controlling interest in the project company”, Item J.1(a), “Choice of sub-contractors”, all in Chapter IV, “Construction and operation of infrastructure ...”; Item C, “Extension of the project agreement” and item D, “Termination”, in Chapter V, “Duration, extension and termination of the project agreement”; item B.9, “Tax law”, and item 14, “Anti-corruption measures” in Chapter VII, “Other relevant areas of law”*

52. The 2013 Colloquium noted the importance of ensuring transparency throughout PPP projects, and not just in the selection process. An example given was of the need for transparency in the transfer of resources from the public sector to the project operator during the operation period. This Colloquium may wish to note that the work

of UNCITRAL on transparency in investor-State disputes contains discussions relevant to this topic. The UNCITRAL Rules on this topic are founded on the importance of transparency to good governance, a predictable regulatory framework and the importance of these elements in encouraging investment and hence sustainable development, the right of public access to information,<sup>10</sup> and the link to rules and procedures in public procurement and public financial management (as envisaged under UNCAC).

53. It has been acknowledged that although the PFIPs Instruments emphasize the general importance of transparency in the legislative framework, in regulatory and administrative processes and decisions, in the selection process (including as regards the treatment of unsolicited proposals), and in the operation of infrastructure, other references to transparency focus on a description of relevant provisions found in some national systems. Examples of the latter include transparency in project accounts, in administrative decisions on equity transfers, in any rules governing the choice of subcontractors and on extension of the concession period. Indeed, the only reference to transparency in the Legislative Recommendations and MLPs is in Recommendation 1, providing that the constitutional, legislative and institutional framework should ensure transparency (among other objectives).

54. The importance of transparency as a tool to ensure accountability and good governance has long been recognized and implemented in international texts on public procurement and PPPs. As noted above, it is a cornerstone principle of UNCAC. In the PPPs context, transparency is also critical for encouraging private participation in projects. The OECD principles referred to above state that the PPPs system “should ensure public awareness of the relative costs, benefits and risks of [PPPs], [and should include] active consultation and engagement with stakeholders as well as involving end-users in defining the project and subsequently in monitoring service quality”.<sup>11</sup>

55. It has therefore been suggested that any future legislative text on PPPs should include more robust transparency provisions in all the above areas, in terms of model provisions rather than guidance alone. Transparency requirements in selection procedures can draw on work in public procurement and the current provisions in the PFIPs Instruments. As regards the planning stage of PPPs, public scrutiny of the decisions underpinning infrastructure plans and decisions on individual projects has been urged. For example, and as compared with traditional procurement, the “off-the-books” nature of some liabilities in PPPs has been stated to discourage responsible decision-making as regards fiscal sustainability and have negative implications for future borrowing and investment abilities. The IMF has recommended disclosure requirements on financial aspects of PPPs;<sup>12</sup> it is suggested that this type of approach can support better decisions on fiscal matters.

56. Clarity as regards the socioeconomic and developmental goals being pursued through a PPP can assist in measuring whether or not those goals are met: also, as payments to the project operator are likely to be based on defined performance outcomes, transparency of the outcomes concerned is clearly needed for an objective evaluation of performance. The consultations prior to this Colloquium also emphasized that any future PPPs legislative text should consider the extent to which project agreements should be published as an aid to accountability. Issues surrounding contractual governance in a country have been cited as challenging in this context, as are necessary exemptions from disclosure. The discussions in UNCITRAL on exceptions to disclosure for commercial and other public interest reasons in the investor-State context may also provide useful parameters for assessing when information should not be disclosed in the PPPs context. In practical terms, also,

<sup>10</sup> A right recognized in international tribunals, such as in *Claude Reyes v Chile* (2006) (Inter-American Ct HR); *Társaság V Hungary* (2009) (ECtHR).

<sup>11</sup> Principle 1, OECD Principles for the public governance of PPPs, *supra*.

<sup>12</sup> See PPPs, Government Guarantees and Fiscal Risk, IMF, 2006, available at [www.imf.org/External/Pubs/NFT/2006/ppp/eng/ppp.pdf](http://www.imf.org/External/Pubs/NFT/2006/ppp/eng/ppp.pdf).

commentators refer to the need to avoid what has been termed blanket publication of “zombie data”,<sup>13</sup> which can in fact undermine accountability.

57. At the 2013 Colloquium, it was also suggested that UNCITRAL should encourage good governance by establishing a global transparency registry that would track operators’ records, to be available for governments to consult when assessing potential partners.

58. The Colloquium may therefore wish to set out key aspects of transparency that it recommends should be included in any future legislative text on PPPs.

(ii) *Other issues*

59. Other topics that the experts indicate may require less significant revision in the PFIPs Instruments include the authority to engage in PPPs, insolvency and security interests following the issue of UNCITRAL texts on these topics,<sup>14</sup> and accounting and financial issues relating to fiscal sustainability, such as disclosure of PPPs and their contingent liabilities in government balance sheets (including rules to assist in the difficult task of assessing risk for this purpose).

**6. Conclusions as to elements to be included in any new legislative text on PPPs**

60. The 2013 Colloquium and consultations since the 2013 Commission session have indicated that the experts broadly agree on the main recommended topics for revision in PFIPs Instruments.

61. The Colloquium may therefore wish to assess and report on the scope of work required for those topics and others it considers relevant. It may also wish to provide an indication of the likely extent and time frame for a work programme to develop a legislative text including the topics concerned, and allowing for additional aspects to emerge. In its report, the Colloquium may also consider it appropriate to set out the assumptions upon which these conclusions are based, as well as relevant contingencies.

62. In addition, and noting the preliminary nature of the research and studies carried out to date, the Colloquium may consider that its recommendations should emphasize that any mandate given should be sufficiently flexible to allow a legislative text to be developed without further or repeated referrals to the Commission to amend the mandate as issues are developed.

**C. Nature of any legislative text to be recommended**

63. At the 2013 Colloquium, the prevailing view was that the desired legislative solution for any future work on PPPs would be a Model Law, because it would provide a relatively easy-to-use framework for legislators and would encourage a good level of predictability and security in the legal framework (reducing susceptibility to political change where PPPs are regulated through guidance only, for example). Noting that not all issues are susceptible to legislative solution, that Colloquium encouraged UNCITRAL to be clear about the aspects of PPPs suitable for a Model Law and those to be addressed in accompanying guidance or other forms of regulation. In addition, the Colloquium noted that the benefits of a Model Law include that it provides a flexible, non-prescriptive text, with best practice upon which there is international consensus, covering all essential provisions for (in this case) the types of PPPs regulated. Such a Model Law would identify minimum requirements for each project (that is, those for which a legislative solution is appropriate) and which provisions are required but should be drafted on a project-by-project basis. In addition, the Colloquium emphasized that an accompanying Guide to Enactment

<sup>13</sup> Referred to in “Public-Private Partnerships (PPPs) in International Development: Are we asking the right questions?”, CAFOD, 2013, available at [www.cafod.org.uk/curation/search?SearchText=ppps](http://www.cafod.org.uk/curation/search?SearchText=ppps).

<sup>14</sup> See the post-2003 texts available at [www.uncitral.org/uncitral/uncitral\\_texts/insolvency.html](http://www.uncitral.org/uncitral/uncitral_texts/insolvency.html) and [www.uncitral.org/uncitral/en/uncitral\\_texts/security.html](http://www.uncitral.org/uncitral/en/uncitral_texts/security.html).

would be critical to provide for the effective implementation and use of the Model Law, but also to explain options and possible deviations from the text.

64. The alternative view, updating the Legislative Guide rather than drafting a Model Law, also received some support at the Colloquium. Reasons for so doing included historical political resistance to UNCITRAL's engaging in areas beyond its core competence (such as institutions in enacting States), concerns about the complexity of the subject, and the need to preserve significant flexibility. Here, it was noted that the analytical guidance that a Legislative Guide could provide would assist in identifying and overcoming obstacles to effective PPPs.

65. The form of a desirable legislative text on PPPs was therefore an important element of the consultations prior to this Colloquium. While the majority of experts continue to recommend a Model Law and accompanying Guide to Enactment, the following concerns have been raised about seeking to produce a Model Law. They can be separated into concerns about model laws generally, and PPP-specific concerns.

66. The main concerns raised about model laws generally revolve around the difficulty of tailoring them to suit local circumstances, without compromising their usefulness and, on the other hand, the temptation to copy a model law into local law without such tailoring. Although these issues appear diametrically opposed, they both raise questions of transferability: does the legal, social, economic, cultural and political context render the use of a model law ineffective? The Colloquium may wish to consider UNCITRAL's experience in promoting and supporting the use of model laws in various subjects in considering this question, such as the recent experience in issuing much more comprehensive Guides to Enactment of UNCITRAL's more recent Model Laws

67. On the question of institutions in an Enacting State, UNCITRAL's recent experience in insolvency, public procurement and secured transactions,<sup>15</sup> as well as the consultations prior to this Colloquium, indicate that domestic institutions, previously considered politically sensitive and possibly outside UNCITRAL's core areas of competence are now accepted as part of UNCITRAL's remit.

68. On the question of PPP-specific concerns, the following issues were raised:

That the selection process, if based in traditional procurement procedures, would be insufficiently flexible for a PPP. Here, the Colloquium may wish to consider both the comments made at the 2013 Colloquium on this question, and the issues set out in the section on Selection procedures, above;

That modern PPPs laws include provisions on the prioritization and development of projects and other aspects of planning, which would be difficult to incorporate in a Model Law on PPPs. Again, the Colloquium may wish to consider the issues set out above, in the section on Project planning and preparation, above;

That combining general concern about "cutting and pasting" into a Model Law and the need to take account of a wide range of other relevant laws in PPPs would risk an incoherent and ineffective legislative framework. Here, the Colloquium may wish to separate the laws that would be relevant to all large infrastructure projects, and those arising in the PPPs context. The former must be taken into account in public procurement and are therefore addressed in UNCITRAL's work on that topic (including in the Guide to Enactment to the Model Law on Public Procurement), and have not previously been subject to the same concern. The latter may include constitutional law, privatization laws, corporate law, secured interests law, insolvency law, changes in legislation, and issues arising out of long-term contracts (e.g. variations in contractual terms), and financial and investment issues. Many of these issues are addressed in the current Legislative Guide as noted in the section on Other relevant laws above, and the Colloquium may consider that they would remain issues of guidance

<sup>15</sup> See, also, 2013 Colloquium Discussion Paper, *supra*, para. 35.

rather than for a Model Law. If so, the question becomes whether these topics are so significant that a Model Law would cover an insufficient area of PPPs to be effective.

69. The report of the 2013 Colloquium also noted the non-binding nature of model laws, legislative guides and guides to enactment, and concluded that updating the Legislative Guide alone would not provide the easy-to-use framework referred to above.

70. This Colloquium may wish therefore to consider this question anew: the lack of consensus on the type of legislative text recommended is one of the issues that the Commission relied upon when instructing the Secretariat to engage in further preparatory work before the Commission would decide on the referral of PPPs as a topic to a Working Group.

#### **D. Importance of possible future work on PPPs**

71. The Commission agreed with the conclusion of the 2013 Colloquium that PPPs have become an important tool “in securing resources for infrastructure and other development, at the international and regional levels and for States at all stages of development”.<sup>16</sup> The Commission’s sentiments echo statements from heads of State and Government and high level representatives made at the United Nations Conference on Sustainable Development in 2012 (the “Rio +20 Summit”), acknowledging “that the implementation of sustainable development will depend on active engagement of both the public and private sectors” and recognizing “that the active participation of the private sector can contribute to the achievement of sustainable development, including through the important tool of public-private partnerships”.<sup>17</sup> The Rio + 20 declaration:

Stated that “we reaffirm that international trade is an engine for development and sustained economic growth, and also reaffirm the critical role that a universal, rules-based, open, non-discriminatory and equitable multilateral trading system, as well as meaningful trade liberalization, can play in stimulating economic growth and development worldwide, thereby benefiting all countries at all stages of development, as they advance towards sustainable development. In this context, we remain focused on achieving progress in addressing a set of important issues, such as, inter alia, trade distorting subsidies and trade in environmental goods and services”;<sup>18</sup> and

Declared support for “national regulatory and policy frameworks that enable business and industry to advance sustainable development initiatives taking into account the importance of corporate social responsibility.”<sup>19</sup>

72. At the Commission session in 2013, delegations emphasized that promoting sustainable economic and social development and the rule of law were important when assessing the priority to be ascribed to topics.<sup>20</sup> As noted above, the importance of PPPs in enabling pro-poor projects and social responsibility, as well as more general sustainable development issues, were emphasized at the 2013 Colloquium.

73. As noted in Part I of this paper, the Commission will consider whether or not to grant a mandate for legislative development in PPPs not only on the basis of the technical merits of a recommendation to this end, but also by reference to other work recommended. At the last two Commission sessions, in 2012 and 2013, it has noted the following points regarding prioritization of topics:

The importance of identifying potential users of a text if developed;

<sup>16</sup> Report of 46th session, document A/68/17, para. 36.

<sup>17</sup> Para. 46 of “The future we want”, adopted in Rio de Janeiro on June 22, 2012 at the Rio+20 Summit, G.A. Res. 66/288, available at [www.un.org/en/sustainablefuture/](http://www.un.org/en/sustainablefuture/).

<sup>18</sup> *Ibid.*, para. 281.

<sup>19</sup> *Ibid.*, para. 46.

<sup>20</sup> Report of 46th session, *supra*, para. 297.



The need to articulate the importance of the development of a text and of UNCITRAL's undertaking the work within the United Nations context;

The desirability of a strategic approach to responding to global events, developments in technology, and changes in commercial trends (citing examples of various means of engaging private capital for satisfying public needs, for example through public-private partnerships and private sector provision of State services, financial contracts and consumer insolvency);

The need to specify the priority that States attach to that work;

The need to quantify the economic impact or necessity of that work;

Avoiding the creation of de facto permanent Working Groups;

Allowing for the flexibility UNCITRAL needs to preserve to adapt to newly emerging priorities; and

Examining the work of other organizations that might be relevant to topics under consideration for future work by the Commission.<sup>21</sup>

74. At its session in 2013, the Commission emphasised that “the extent to which an envisaged legislative text would support the development of international trade law as expressed in the mandate given to UNCITRAL by the General Assembly should be the main factor guiding the Commission in deciding whether or not to take up a topic.”<sup>22</sup> Applying its general considerations to future work, the Commission stressed in the context of issuing a mandate to Working Group I the importance of addressing “legal obstacles faced by micro-, small- and medium-sized enterprises throughout their life cycle and, in particular, those in developing economies” (see, further, the sections on PPPs with small private operators in Part I of this paper, and on Domestic preferences, above).<sup>23</sup>

75. The Colloquium may wish to assist the Commission in its deliberations by setting out relevant factual considerations pertaining to these issues in its report.

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<sup>21</sup> See the following documents for the Commission's 45th session in 2012: “A strategic direction for UNCITRAL”, document A/CN.9/752, paras. 19-22, available at [www.uncitral.org/uncitral/commission/sessions/45th.html](http://www.uncitral.org/uncitral/commission/sessions/45th.html) and A/CN.9/752/Add.1, para. 24 (available at the same location), which noted “the role and relevance of UNCITRAL both within the United Nations and in the field of international trade and commerce. UNCITRAL's role and relevance can be assessed by reference to the work and priorities of the United Nations, donor communities and priorities of national governments. Key developments, such as the Paris Declaration on Aid Effectiveness (2005), and major international issues of concern — anti-corruption agenda, 2008 global financial meltdown, conflict/post-conflict situations — will shape the priorities of these bodies”. See, also, section IV.B (“Prioritization of subject areas”) in “Planned and possible future work”, a document for the 46th session in 2013, document A/CN.9/774, available at [www.uncitral.org/uncitral/commission/sessions/46th.html](http://www.uncitral.org/uncitral/commission/sessions/46th.html).

<sup>22</sup> Report of 46th session, *supra*, para. 297.

<sup>23</sup> *Ibid.*, para. 321.

**E. Note by the Secretariat on possible future work in Public-Private Partnerships (PPPs)  
Report of the UNCITRAL colloquium on PPPs**

(A/CN.9/821)

[Original: English]

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## **I. Introduction**

1. At its forty-sixth session in 2013, the Commission considered the report of an earlier Colloquium on possible future work in PPPs, held from 2-3 May 2013. Recognizing the key importance of PPPs to infrastructure and development, the

Commission requested further preparatory work to define a clear mandate before deciding whether to task a Working Group with work on PPPs.<sup>1</sup> Accordingly, the Commission agreed that a second Colloquium should be held, and its results presented to the Commission at its forty-seventh session.<sup>2</sup>

2. The resultant Colloquium was held in Vienna, from 3 to 4 March 2014. It brought together experts from government, intergovernmental and international non-governmental organizations, private sector and academia. The Colloquium discussed whether legislative work on PPPs was timely and feasible, the scope of any future legislative text on PPPs, and key technical issues.

3. The Colloquium based its deliberations on a Discussion Paper (documents A/CN.9/819 and A/CN.9/820), background material and presentations made at the Colloquium itself, available at [www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2014.html](http://www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2014.html).

## **II. The importance of enabling effective PPPs (A/CN.9/820, paras. 71-75)**

4. The Colloquium endorsed the conclusions of the Commission and other bodies, reported in the Discussion Paper, that effective and efficient PPPs would be crucial for sustainable economic and social development. It underscored the significant and widening gap between infrastructure needs and public funds available to meet them (the infrastructure funding gap), cited as \$40bn annually for Africa and substantially more for South-East Asia. It was observed that annual infrastructure investment needs until 2020 exceeded \$750 billion in Asia and the Pacific alone.<sup>3</sup> Consequently, it noted, an increasing potential for PPPs to finance such investment.

5. The Colloquium agreed that a main issue for consideration was the potential contribution of an UNCITRAL legislative text to enabling effective PPPs, noting that donor agencies including the multilateral development banks (MDBs) and other United Nations and regional bodies were already advising on the use of PPPs and designing relevant projects.

## **III. Preparatory studies and consultations prior to the Colloquium (A/CN.9/819, paras. 10-23)**

6. The Colloquium noted that the Secretariat, experts and consultants had conducted extensive surveys of existing PPP laws to identify the main topics that any future legislative text should contain, by reference to the extent to which those laws (a) reflected the main topics in the three texts comprising the UNCITRAL PFIPs Instruments<sup>4</sup> and (b) included novel approaches.

7. The Colloquium heard a detailed presentation on the surveys. The Colloquium took note of the methodology applied and findings in the consultants' report,<sup>5</sup> also summarized in paragraphs 15-18 of document A/CN.9/819.

8. The laws of the 58 States surveyed were estimated to cover up to 80 per cent of PPP laws worldwide. The sample was considered representative as the States concerned had been selected from all regions, with varying levels of economic development and different legal traditions. The surveys analysed the general legislative and institutional framework, project risks and government support,

<sup>1</sup> Report of the Commission, A/68/17, paras. 327, 330-331.

<sup>2</sup> *Ibid.*, para. 331.

<sup>3</sup> ADB-ADB I study, Infrastructure for a Seamless Asia.

<sup>4</sup> The UNCITRAL Legislative Guide (with Legislative Recommendations) and its Model Legislative Provisions on PFIP, available at [www.uncitral.org/uncitral/uncitral\\_texts/procurement\\_infrastructure.html](http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html).

<sup>5</sup> Available at [www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2014.html](http://www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2014.html).

selection of the private party, construction and operation of the facility, duration, extension and termination of the project agreement, and settlement of disputes. They assessed the extent of compliance with each of the thematic areas in the PFIPs Instruments.

9. Most PPP laws surveyed reflected the main topics of the Legislative Guide, but 42 per cent of States did not meet the Legislative Recommendations overall. The approaches to implementing these Recommendations varied significantly. Compliance gaps were more frequently observed in the regulatory framework and contractual provisions, rather than in selection procedures. The lowest level of compliance was found in dispute resolution (Chapter VI of the Legislative Guide).

10. On the other hand, it was also noted that an analysis by the European Bank for Reconstruction and Development (“EBRD”) of PPPs laws in its countries of operation had found that the provisions on dispute resolution demonstrated the highest compliance with the PFIPs Instruments.

11. Procedures and other regulatory standards in some jurisdictions addressed some topics that were missing in the primary law. Overall, the survey found no significant regional variation in the scope of national laws, though it was acknowledged that some jurisdictions with mature PPPs regimes had not been included in the surveys (including the United Kingdom of Great Britain and Northern Ireland). The findings also identified topics that were not addressed in the PFIPs Instruments at all, or that featured in the Legislative Guide only (the “gap elements”). Examples of legislative provisions on some gap elements in national laws were provided.

12. Participants shared relevant developments from their experience. It was reported that, in Australia and the United Kingdom, emerging forms of funding mechanism and risk distribution were changing the governance and structure of PPPs including selection methods.

13. Other main conclusions from the studies, consultations and additional issues reported to the Colloquium were that:

(a) The use of PPPs was increasing in developing countries and PPP laws were being introduced in States at all levels of development;

(b) Existing PPP laws varied in scope and quality;

(c) PPP laws passed after 2009 were more comprehensive and addressed more elements of the Legislative Guide than earlier texts. They contained novel approaches, especially on governance and planning. Earlier texts had generally focussed on the procurement aspects of PPPs, which was noted to be insufficient;

(d) In some cases, legislative gaps were being met by stringent administrative approval requirements (using committees and ex-ante reviews), indicating a possible lack of confidence in some public authorities and their advisers. Without a robust institutional framework in such a situation, it was noted, there would be serious obstacles to effective PPPs;

(e) Relatively frequent updating of national PPP laws, to address deficiencies in earlier legislation, was found;

(f) An emerging convergence of policy solutions for some aspects of PPPs could be seen, including for topics previously not considered amenable to legislative treatment, and reflecting an increasing maturity in some PPP markets and market developments;

(g) However, many jurisdictions were struggling to enact effective PPP laws and were designing solutions from scratch, in the absence of a clear and coherent model upon which to base national legislation.

14. Concluding that gaps and wide variations in the overall scope of PPPs laws remained, the Colloquium agreed that a new UNCITRAL legislative text on PPPs was necessary, and would be timely. Noting that the studies and reports demonstrated that the starting-point for such a legislative text should be the PFIPs Instruments (as

further elaborated in Section IV below), it recommended that the three texts concerned should, at a minimum, be consolidated for ease of use. Further, as such a text was demonstrably needed in a relatively short time frame, the scope of work that should be undertaken should be carefully considered.

15. It was emphasised that a legislative text would not replace the need for further guidance, sector-specific codes, standards and other tools that would support the effective implementation and use of a PPPs law.

16. It was also agreed that some States that had not been surveyed (such as China, South Africa and the United Kingdom) would have significant experience and/or well-established legislation that could and should inform UNCITRAL's work. Further, the work of other bodies that were researching obstacles to effective PPPs (such as why there was limited interest in bidding for PPPs) should be taken into account.

#### **IV. Main issues for any future legislative work on PPPs**

17. The Colloquium noted that the consultations and studies had identified a series of key issues necessary to be addressed in a legislative text on PPPs. The Colloquium considered those issues sequentially, as reported below, and concluded a combination of updating the PFIPs Instruments, providing more detail than in current provisions and introducing new provisions would be needed.

##### **A. Scope of any future legislative text on PPPs (A/CN.9/819, paras. 24-42)**

18. The Colloquium recognised two key issues as regards the scope of a legislative text on PPPs: (1) which projects should be considered as PPPs, and (2) whether all such projects should be regulated. It was also recalled that the scope of a legislative text should be clear, so that the Commission would be able to assess the resource implications concerned.

##### **1. Which projects should be considered as PPPs?**

19. The Colloquium recalled that PPPs were now generally recognized as a legal concept, but that no universal definition of PPPs existed. However, it was agreed that a project must include certain features to be classified as a PPP, including: the selection by a public authority of a private party to construct, renovate, maintain and/or to operate infrastructure, and/or to provide services, and a long-term contractual relationship between those parties. Some participants also considered that all these elements should be present. PPPs, it was added, involved substantial private investment in the project, and required the private party to take on at least some, and perhaps a substantial part, of the risks of the project.

20. It was agreed that the term PPPs was in practice used to refer to many forms of project, including:

(a) Projects involving the construction of infrastructure with provision of services, including maintenance and operation of a facility, and services to the public (end users), also termed social services or services of general interest;

(b) Projects involving the construction of infrastructure with provision of limited services such as maintenance and operation of a facility; and

(c) Services-only projects (sometimes termed outsourcing contracts), without infrastructure construction, which could include maintenance, operation and general interest or public services.

21. Two mechanisms for payment of the private party were noted, i.e.:

(a) PPPs in which the private party is paid directly by the public authority ("PFI-PPPs"); and

(b) PPPs in which the private party is paid through levying charges on users (“concession PPPs”).

It was noted that PPP projects could combine both payment mechanisms.

22. The term “infrastructure plus service PPPs” was used to describe PPPs of the type described in paras. 20(a) and (b) above, as in both types, the private sector delivered public services to end users. Concessions for such infrastructure plus service PPPs were traditionally considered the most common form of PPP. However, in examples of PFI-PPP projects in Australia, France and the United Kingdom since 2004, the private party constructed a facility (providing the finance for so doing) and subsequently maintained (and perhaps operated) the facility. This approach, it was said, was particularly the case for hospitals, schools, prisons and other public buildings or in what was called the “non-merchant” sector, though it could also be used for non-profit projects such as transport and housing. In such projects, availability payments and fees for the services provided were paid at the time of delivery throughout the duration of the contract, and by the public authority concerned rather than by end users. The public services that a facility was constructed to provide — such as clinical services, or educational services — were provided by the public authority, and not by the private party. It was noted that enabling contracts for the provision of these non-merchant services would not require significant modification to the PFIPs Instruments.

23. This latter project type was said to be dominant in many jurisdictions. However, it was observed that it did not transfer commercial risk to the service-provider, and views accordingly differed as to whether these projects were in fact PPPs. Other project types — such as design and build contracts, and refurbishment contracts without ongoing service provision — were not considered to be PPPs but public procurement contracts. Nonetheless, it was noted that many national PPP laws included provision for such projects, in part because they could not be undertaken using traditional public procurement laws. Privatizations were also noted not to be PPPs.

24. Service-only projects for the private provision of social services and management contracts could be found in Australia, for example, without the construction or operation of physical infrastructure. Here also, views differed as to whether these projects were in fact PPPs, and whether they could be undertaken using traditional public procurement laws.

25. Other forms of PPP described, which had increased in prominence since the issue of the PFIPs Instruments, included institutional PPPs (iPPPs), i.e. PPPs operated through a joint venture between the public authority and private service-providers, and PPP structures in which the private shareholder was a State-owned enterprise (SOE). An increasing number of national laws also provided for these PPPs, it was observed, which had the common feature of a public interest in the private party.

26. It was agreed that the existence of these newer forms of PPP required the revision of the PFIPs Instruments, both to extend the types of projects addressed, and to update the guidance on the projects themselves. It was reported, in this regard, that the Legislative Guide was being applied in practice to projects that it was not designed to cover, and that a new text could address this problem.

## **2. Which projects could and should be regulated in a legislative text on PPPs?**

27. It was agreed that a legislative text on PPPs should include those based on the minimum features of a PPP described in paragraph 19 above, without providing a definition per se. That is, a text would most usefully address projects for the design, construction, renovation and finance of infrastructure, with the provision of associated services (both maintenance-type and public services), whether the payment for the services was derived from the public authority, from end users or from a combination of the two. For the purposes of this report, such PPPs are termed “core PPPs”. It was noted that this approach would enable a future legislative text to be largely based on the PFIPs Instruments. It was emphasized that these forms of projects

would be the main ones needed to address the infrastructure gap referred to in paragraph 4 above.

28. It was also agreed that other forms of PPP that could be integrated within core PPPs without substantial additional work would also be addressed. Otherwise, these non-core PPPs would be put aside for possible additional future work. For two examples considered during the Colloquium, see Sections B.4 and B.5 below.

29. The Colloquium also confirmed earlier recommendations that natural resource concessions (for example, those in the oil and gas and mining sectors) and agriculture concessions should be excluded from an UNCITRAL legislative text. Such concessions would not involve service provision and risk transfer, and would involve sector-specific issues. In addition, many such projects were already the subject of significant existing international guidance, it was said.

30. The Colloquium also recommended that the proposed legislative text should address the following forms of core PPPs:

(a) PPPs involving the provision of maintenance-type services only. Key concerns included that the discipline of periodic or market adjustment that would be found in a concession would be absent in these projects, which were publicly-funded. In the context of a contract term of perhaps 25 years, sound preparation studies including assessments of value for money, a public sector comparator and affordability would be critical, especially where minimum payments were guaranteed by the State. In this regard, the example of Brazil (which had established a fund for such guarantees) was cited. Further, it would be necessary to adapt regulations for small- and medium-sized projects common in this type of PPP, such as through the issue of standardized documents and streamlined procedures;

(b) iPPPs. Key concerns here included the need for regulations on the public interest in the private party and the selection of the private shareholder in the joint venture (which would be the beneficiary of the project), to address governance risks (such as conflicts of interest and corruption), and risks to transparency and competition. The governance risks would be particularly acute where there was a majority public interest in a bidder, with a public authority commissioning the services, as there would be no genuine competition and a conflict of interest, it was observed. Particular concerns had arisen in some States with a high proportion of SOEs, where such iPPPs had been used to bypass PPPs regulations.

31. Other emerging challenges in all forms of PPPs included adapting contracts to changing market conditions and changes in the regulatory and socioeconomic landscape, innovative ways of providing services (prompted by the abolition of government monopolies or emerging service needs, for example), encouraging competition in bidding, and securing the continuing provision of services. These issues would require more targeted guidance on concluding effective global and long-term contracts than currently available. Here, it was emphasized that existing laws were generally not adequate to adapt contracts to changing conditions.

32. It was added that these issues would require mainly adaptation and extension of the PFIPs Instruments, rather than the design of completely new concepts. Revisions to the PFIPs Instruments could also draw on existing good-quality regulations and experience at the national level; examples for iPPPs included provisions limiting the public interest in a joint venture to a minority shareholding (an example of 20 per cent was cited), and requirements for transparent selection procedures in the selection of the private shareholder, drawing on those for the award of a project.

33. Although some PPPs might fall within the scope of existing public procurement and/or concessions laws, it was considered that those laws did not address all relevant aspects of PPPs. Accordingly, guidance should recommend a coherent legislative framework, requiring the same standards of governance, integrity and procedures designed to achieve value for money and the effective provision of infrastructure and services for all projects. Thus, for example, existing concessions laws could be incorporated into a broader legislative framework to enable PPPs.

## **B. Key topics for inclusion in a legislative text**

34. The following sections of this report set out the main technical issues that the Colloquium considered were not adequately provided for in the existing PFIPs Instruments. The Colloquium emphasized that these reflected the main such issues, and were not intended to provide an exhaustive list of topics for consideration in the development of a legislative text on PPPs.

### **1. Institutional framework (A/CN.9/819, paras. 43-52)**

35. The importance of a robust institutional framework to support the entire PPP life-cycle was emphasized. A “PPP Unit” was commonly found at the national level, but there were very few examples of sufficiently comprehensive frameworks outside the most highly-developed States. Elsewhere, bidders’ due diligence of the national frameworks often encouraged them not to bid, or only weak bidders to bid, it was said.

36. It was added that the need for a better institutional framework was particularly acute in concession PPPs, which were qualitatively different from the PFI-PPPs that could draw on long-standing public procurement experience. Key needs for capacity-development included: long-term contract design and management; addressing changes in regulation, the political situation and public payment capacity, and changes to the contract such as in the scope of services; addressing issues of custom law, tax law, land use, expropriation, and issues affecting service delivery and environmental impact. The involvement of several line Ministries in each project could be anticipated, many of which would need to be educated about PPPs as a new technique.

37. It was added that the institution would need to provide a “pipeline” of forthcoming projects. The pipeline would need to be well-understood both domestically and internationally if bidders of suitable quality were to be attracted. In addition, the institution should develop tools for monitoring the design and implementation of projects.

38. The potential for conflicts of interest to arise if the institution were tasked with both operational and monitoring functions was raised. UNCITRAL’s work on public procurement agencies (in the Guide to Enactment of its Model Law on Public Procurement) could be adapted to provide general protection against such conflicts of interest, it was said.

39. The importance of a central institution, with access to the highest authority and the capacity to lead Ministries, was underscored. It was also considered that regional and local institutions would be critical to ensure that the capacity of the sub-sovereign market for PPPs and associated services was understood. In turn, this would imply the need for coordination among the various levels of institutions and the integration of existing structures, so as to ensure that core local expertise was available, the approach in the United States of America, for example, and noted the planned national system of Indonesia. The United Nations Economic Commission for Europe (UNECE’s) “PPP readiness assessment tool” could assist States in analysing their national systems, it was noted.

40. In summary, it was agreed that the above key attributes of a suitable institutional framework would support high standards of governance. It was considered that the reference sources and national experience provided to the Colloquium indicated that achieving consensus on legislative provision and supporting guidance would be relatively straightforward.

### **2. Cross-border PPPs (A/CN.9/819, paras. 53-56)**

41. It was noted that cross-border projects (CBPPPs) were increasingly attractive and provided integrated networks such as transport corridors; they also enabled projects that were beyond the means of any one State. However, it was reported, they raised specific problems not addressed in the PFIPs Instruments — including different



legal systems and multilateral agreements. It was considered that the lack of guidance at the international level on CBPPPs was a disincentive to many States from contemplating and engaging in CBPPPs.

42. Experience in CBPPPs and related joint projects involving more than one State was shared, which underscored the need for further work in the area. It was stated that no project under the “New Partnership for Africa’s Development” (NEPAD) had been procured, and there had been transport sector failures in some joint projects in Austria and Hungary, and France and the United Kingdom. However, experience in the power and energy sectors had been more successful, including in Africa, South-East Asia, and Latin America.

43. It was agreed that a legislative text on PPPs should address the private law aspects of CBPPP. Three options, set out in paragraph 55 of A/CN.9/819, were considered. After discussion, it was agreed that the second option was preferable, which combined limited new legislative provision with guidance on how to use, adopt and adapt existing provisions in the PFIPs Instruments and at the national level.

44. The Colloquium agreed that achieving consensus on the solution would again be feasible.

### **3. Governance and social responsibility (A/CN.9/819, paras. 57-63)**

45. It was noted that the questions of governance and social responsibility were not addressed as a discrete topic in the PFIPs Instruments, but that (as document A/CN.9/819 noted), they were critical to enabling social and economic development through PPPs. In this context, it was agreed a legislative text should require that the development goals being pursued through a PPP be transparent.

46. It was underscored that governance in the PPPs context was considerably more complex than corporate governance — the wide range of stakeholders, complex organizational structure, the social obligations (delivery of public service) and the long-term contract relationships would need to be considered and, where appropriate, integrated into a legislative text and associated guidance. Here, the notion of administrative responsibility arose in that public service needs should drive what would be considered to be socially responsible projects. Public sector comparators, value for money analyses and economic benefits and impact studies would be the key to conducting appropriate due diligence and ensuring both the integrity of the process and responsible public administration.

47. The key elements of checks and balances in the system were discussed, including roles and responsibilities and separating functions that would otherwise raise potential conflicts of interest. In addition, systems would need to encourage ethical behaviour and compliance with fiduciary duties. A PPP law could provide for ethics review boards, for example, as had been seen in one case studied. Tools would include whistle-blower protection, and conflict of interest provisions.

48. It was noted that these issues were an integral aspect of sustainability, the driving force behind the Rio+20 Declaration. The Colloquium’s attention was drawn to an existing standard — ISO 26000 — that could serve as a useful point of departure for provisions in the PPPs context, and which would allow civil society input to be provided.

49. In addition, it was noted that best practices in a public authority should reflect some private sector commercial techniques, and the private party would need to observe some public service standards. At the practical level, experience showed that public authorities’ lack of negotiating expertise, problems in renegotiating projects and allegations of collusion were undermining good governance and trust in PPPs. Public concern at projects developed for short-term political gain and related governance issues could, it was suggested, be addressed through widening public participation in the planning and monitoring of projects.

50. It was agreed that the issue could be seen to be critical in the selection of PPP projects, which should be done under the auspices of an infrastructure master plan

rather than on a project-by-project basis (see, further, Section B.7 below). Opening the plan up to public scrutiny would be a simple and effective step, it was said. However, caution was urged against prescriptive legal provision in this context, which might undermine good governance. Here, the Colloquium's attention was drawn to a report by Chatham House — "Conflict and Coexistence in the Extractive Industry", which provided guidance on standards and approaches.

51. In summary, it was agreed that a future legislative text on governance should address:

- (a) How to identify, articulate and evaluate public needs, social and other development goals;
- (b) How to balance public and private sector needs;
- (c) How to develop appropriate standards of conduct; and
- (d) How to avoid the incorporation of myriad and conflicting policy goals into projects.

52. It was further agreed that the provisions should emphasize transparency, and draw on the experience discussed. In addition, it was noted that the recent report from the United Nations Secretary-General on "Globalization and its impact on the full enjoyment of all human rights" (A/Res/68/168) would provide assistance in incorporating standards of conduct into PPP projects, so that coming to consensus on the appropriate legislative provision and supporting guidance should again be feasible.

#### **4. Funding and investment issues (A/CN.9/819, paras. 64-70)**

53. The Colloquium heard that the traditional PFI funding method (which was based on 80-90 per cent debt to 10-20 per cent equity) assumed that the private party would take on most of the project risk. However, recent experience showed that public authorities were taking on many more risks, including on the level of demand for public services, on refinancing, and were guaranteeing income streams.

54. Weaknesses in existing models including, it was reported, permitting sales of debt and equity in the secondary market, had yielded windfall profits to selling investors and left projects unable to respond to the materialisation of operational risks.

55. These events implied, it was said, a fundamental shift in PPP structures. Additional models of PPPs to address the weaknesses and to accommodate changing funding methods were recommended for a new legislative text on PPPs. It was added that the existing PFIPs Instruments would pose obstacles to these additional models.

56. In addition, it was reported that transaction costs in PPPs relative to project value were increasing, through excessive bid and fee payments, to a level that was considered unsustainable (and exceeded budget provisions). Post-contract management and project running costs could be up to 10 per cent of the project cost according to the European Investment Bank.

57. On the other hand, reserves of funds potentially available for long-term investment — such as those from pension or superannuation funds — were not being made available to PPPs. The long-term investment time frame of these institutions and their long experience in such investments indicated that such funds should be made available to PPPs.

58. The results of studies and consultations into alternative funding models and their operation in practice were shared. The models included using pension fund investment in PPPs as a form of public ownership; using competitions to provide debt or equity finance before procurement of the project itself (the Australian Inverted Bid Model, for example); governments arranging pooled debt (the Aggregator Model in the United Kingdom, for example); using competitions to select managers of project companies, again prior to the procurement of the project. As regards the contract management systems in this type of approach, non-profit distributing models, and

models in which public authorities guaranteed an internal rate of return were noted. It was suggested that these models would both reduce transaction time and costs, and allow the public authority to maintain control of service delivery through inverting the traditional debt-equity ratio noted above.

59. While it was noted that the complexities of the PPPs process and contracts implied complex and more costly procedures, other participants considered that the additional costs generated in a PPPs project should be outweighed by the efficiencies in private sector delivery — and that this was one of the key policy justifications behind PPPs. Similarly, if the service provision and associated risks were not transferred to the private party, a key function of PPPs would be absent, and the projects might not be PPPs in the sense described in paragraph 19 above.

60. Taking into account the novelty of some of the models described, and the need to ensure a clear scope of work in its recommendation to the Commission, the Colloquium decided that the nature of the obstacles to emerging funding models should be studied further. On the assumption that such models could not be integrated into a legislative text on core PPPs, and given the importance of attracting appropriate long-term investments in infrastructure development and the provision of public services, further proposals to the Commission on how to legislate for them would be made at a future time. In the meantime, the proposed scope of work would be limited to core PPPs.

#### **5. PPPs with small-scale operators (A/CN.9/819, paras. 71-76)**

61. The Colloquium heard descriptions of such small-scale PPPs in Africa and Latin America. It was noted that there was no definition of “small-scale” per se, but that such projects were generally found at the local and regional level, and were generally of smaller scale and shorter duration than the traditional core PPPs described above. Small-scale PPPs were reported in waste and water services, tourism, public housing and other service sectors.

62. It was suggested that small-scale PPPs could be further divided into sub-sovereign-PPPs and micro-PPPs, and that the former would be easier to integrate into a general PPPs legislative and institutional framework. The experience of Morocco was cited in this regard. It was also noted that bundling of small-scale PPPs was both increasing the scale of the PPPs and making them more efficient.

63. Nonetheless, at the heart of such PPPs, as all PPPs, was the concept that the public and private sectors agreed to share in service provision and associated risk, using service contracts and concession mechanisms. PPPs with small-scale operators would require good and tailored governance structures, appropriate and efficient institutional support, legal certainty and good practice, but a simplified regulatory framework for procedures and contract forms would be necessary if transaction costs were not to be prohibitive. The need for innovative financial instruments, capacity development and expert guidance would be critical success factors, and the participation of civil society should be encouraged. The work of the French Conseil d’Etat, in association with the Agence Française de Développement and the World Bank in establishing a community of practice was noted in this regard.

64. As regards financing, it was noted that public finance would need to be supplemented by bank lending and other project finance, using such institutions as development banks, micro-finance and other civil organizations and foundations. The extent to which such models could be integrated into a legislative text on core PPPs was questioned.

65. Furthermore, difficulties in addressing micro-finance in UNCITRAL in previous years were recalled, in part given the risk of such work duplicating that of other development bodies. Similarly, the Colloquium was urged to avoid making any recommendations that would duplicate the work UNCITRAL was currently undertaking in providing an enabling legal environment for MSMEs, though it was noted that this work was currently focussing on business formalization and was not intended to cover partnerships with the public sector.

66. The importance of facilitating PPPs with small private operators in any future legislative text on PPPs was emphasized, given their potential contribution to sustainable development. However, whether such PPPs could be integrated into the core PPPs that such a text would address was unclear: micro-enterprises might require a very simplified regime, but other SMEs might be able to operate in a system designed for core PPPs. Consequently, it was agreed that this question would be considered during the development of a text on PPPs, taking into account progress on a UNCITRAL's work on an enabling legal environment for MSMEs, the obstacles that a legislative text on core PPPs might pose to PPPs with small private operators, experience gained in the operation of such PPPs and other developments. Thereafter, future work on PPPs with small private operators might be recommended to the Commission.

#### **6. Consistency between PPPs and other laws (A/CN.9/819, paras. 77-92)**

67. Ensuring such consistency was recognized as critical for the success of PPP projects. The breadth of relevant laws was highlighted, many of which were addressed in the current Legislative Guide. Issues reported as required updating or additional provision included laws on the promotion and protection of investment, licensing issues, data protection and information disclosure, and emerging risk areas — such as political risk in both the developing and developed worlds.

68. The Colloquium recalled that the most effective solution to this type of issue would be in a comprehensive guide to support a future legislative text on PPPs.

69. The Colloquium also heard that the question of overlapping public procurement and concessions laws, and any future PPPs legislation, would need careful consideration not least as many States were addressing PPPs as part of work to modernize their procurement systems. Similarly, coordination with the approach of donor agencies such as the multilateral development banks would be of assistance to States, it was said.

70. The Colloquium noted that as the United Nations Convention Against Corruption (UNCAC) had come into force after the PFIPs Instruments were issued, two areas in particular should be integrated into a future legislative text on PPPs.

##### **(a) Anti-corruption and integrity measures**

71. First, a future legislative text on PPPs should be implement the requirements of article 9 (“Public procurement and management of public finances”) and article 12 (“Private Sector”) of UNCAC. Supporting provisions and guidance should also draw on the OECD Principles for Public Governance of PPPs, the UNECE's Guidebook on Promoting Good Governance in PPPs, and the UNCITRAL Model Law on Public Procurement, among others.

##### **(b) Conflicts of interest**

72. The complexity of conflicts of interest in PPPs was highlighted, noting the many stakeholders and contractual arrangements that such projects involved, complicated further by the fact that the parties might have different capacities in the different contracts involved, and therefore that colliding interests might emerge, particularly where disputes arose.

73. The lack of provision in the current PFIPs Instruments and other texts was also noted. It was agreed that a future legislative text should address the issues of both personal and organizational conflicts of interest, implementing articles 8 and 9(1)(e) of UNCAC in particular, to cover declarations of interest, screening procedures and training requirements, and contractual arrangements. In addition to the Model Law on Public Procurement, a future legislative text would also draw on the 2014 directive on concessions from the European Union.

74. It was agreed that the available source materials indicated that coming to consensus on the appropriate legislative provision and supporting guidance would again be feasible.

**7. Project planning, including the allocation of risk and government support (A.CN.9/820, paras. 1-7)**

75. It was recalled that although the PFIPs Instruments and other international texts on PPPs addressed project planning, the World Bank among others had considered this area a particular weakness, particularly as regards developing a pipeline of projects.

76. Key areas for development in a PPPs legislative text included: identification of public service needs and prioritization among them through establishing a master infrastructure plan, and ensuring a transparent budget framework at the macro level. At the micro level, and within the master plan, individual projects could be planned by reference to the business case, value for money, affordability, comparators of public procurement and PPPs using the public sector comparator and other mechanisms.

77. While transparency in the project pipeline was agreed to be vital in terms of encouraging bidder participation, it was agreed that plans for proposed projects should be reasonably advanced before being presented to the market. If commercial viability could not be demonstrated at that stage, it was said, the resultant procurement was unlikely to attract sufficient interest.

78. It was also agreed that this stage of a project cycle could be separated into two main phases: the first was to consider whether or not to use a PPP or to follow a traditional public procurement. This phase, it was added, should follow pre-set steps and should be undertaken with all relevant institutions in the State concerned. The second phase was to prepare the project for presentation to the market, i.e. ensuring that the time frame and the funding approach were feasible.

79. The need for integration of the planning process with the institutional framework was highlighted, and hence it was considered that a future legislative text on PPPs should ascribe competence for the planning function and the key procedures to be followed.

80. It was also emphasized that the planning stage was critical to ensure that the long-term nature of PPPs projects was sufficiently taken into account, so that complex contracts, with clauses governing modifications, extension of scope of services to be provided and other terms could be set out in the bidding documents. The importance of ensuring that all relevant contract terms in public and administrative contracts were well-known and disseminated was also recalled. It was agreed that good planning and preparation would assist in decreasing the time and cost of the bidding process, would encourage bidding, and would enhance the quality of bids and resultant contracts.

81. It was agreed that master infrastructure plans should be published, but against an express provision to the effect that they did not create binding obligations or rights on the part of potential bidders (as was found in the Model Law on Public Procurement) — otherwise, there would be a disincentive to plan effectively. In addition, it was said, such transparency mechanisms might reduce the risk of inappropriate direct negotiation of projects and might assist in a better approach to unsolicited proposals (as to which, see Section B.12 below).

82. It was therefore agreed that a legislative text should address project planning and preparation, and would draw on the current PFIPs Instruments and other materials referred to above. It was noted that public procurement laws generally did not address the planning phase of projects, or indeed the need for master infrastructure plans. Accordingly, the guidance accompanying a future legislative text would need to encourage States to ensure that equivalent and coherent requirements applied to all infrastructure development and associated service provision in a State, irrespective of the funding mechanism for any particular project, both for good governance purposes and to avoid distorting decisions on funding for projects themselves.

83. Although implementation of provisions on planning and preparation was acknowledged to require significant capacity and support, it was agreed that the

design of the legislative framework and guidance, drawing on the above sources and national experience, indicated that a consensual legislative solution would be feasible.

#### **8. Risk allocation and government support (A.CN.9/820, paras. 8-14)**

84. It was recalled that there was general agreement on the main principle underlying risk allocation in PPPs: the party most able to manage and mitigate a risk should bear that risk. However, this principle was noted to pose considerable difficulties in practice. While detailed feasibility studies might improve the understanding of risks, identifying, defining and measuring risks was difficult, and risks might vary throughout the life of a project.

85. Similarly, risks might not be in the full control of any party and might be perceived and characterized differently by different parties. For example, engineers and construction firms would have different notions of risk, timing and reward among themselves and as compared with financiers. Government guarantees might be necessary even for risks that were not fully in the relevant project authority's control.

86. In addition, it was observed that there might be cultural or institutional reluctance to accept the notion of payment for transfer of any risk to a private party, given that the public sector could self-insure by pooling risks. Furthermore, whether there could be genuine risk transfer for the provision of essential public services was questioned — the public authority would be required to ensure continuity of service.

87. From this perspective, it was suggested that risks and rewards (i.e. a reasonable profit level) should be considered together, so as to achieve an agreed equilibrium in the contract overall. Thereafter, the basic equilibrium of the project should be maintained by adjustment as circumstances might warrant. The basis of the provisions should be on managing risks in the longer-term, adapting the dispute prevention mechanisms existing in the Legislative Guide to address regular meetings, a partnering approach and rules for managing change.

88. In this regard, it was emphasized that good governance principles should apply equally to any changes to the project and associated agreements, and a process contract approach as applied in Australia, a quality of entry approach as applied in Norway, the gateway model applied in the United Kingdom could also serve as useful examples of good practices. In particular, they contained guidance on addressing the observed optimism bias in PPPs. Furthermore, it was said, enhancing long-term equity participation in projects, as discussed in the section on Funding and Investment issues above, could assist in ensuring that risk transfer remains effective throughout the life of the project.

89. It was agreed that these issues should be provided for in a legislative text on core PPPs as an integral part of the planning and preparation process, and that the source materials indicated that consensus on them would be feasible. Additional issues relevant to non-core PPPs only could be proposed to the Commission for separate future work.

#### **9. Selection of the project partner (A.CN.9/820, paras. 15-20)**

90. The Colloquium heard a summary of the detailed provisions in the PFIPs Instruments on selection procedures. It was also reported that traditional public procurement methods, which revolved around open tendering, were unsuitable for PPP projects. However, modern procurement laws, including the UNCITRAL Model Law on Public Procurement, were noted to contain more suitable procurement methods involving interactions between the public authority and potential bidders (discussions, dialogue and/or negotiation). It was also reported that the Model Law contained a method — Request for Proposals with Dialogue — that combined many features of the selection method in the PFIPs Instruments and the EU's Competitive Dialogue procedure and the procedural strictness of two-stage tendering (itself a well-tried and tested method used by the MDBs).

91. Nonetheless, it was observed that PPPs selection procedures would need to accommodate the disclosure of a broader set of terms and conditions of the project

than a public procurement procedure, the probable need for negotiations with the selected project partner so as to conclude a contract, and the probability of post-contract changes in the operation phase.

92. It was recalled that contract negotiations were prohibited for governance reasons in the Model Law on Public Procurement. PPPs experience had shown that permitting parties to the transaction other than the project partner — such as financiers — had been cited as a reason for negotiations at this stage. It was agreed that parties that had not participated in the selection process should not be permitted to take part in such negotiations, precisely to avoid the risks to good governance that were the basis of the prohibition in the Model Law.

93. As regards changes in project terms, it was highlighted that modern procurement legislation might require a new procurement process should the changes be considered material. Thus, public procurement procedures would need some adaptation to PPPs.

94. The Colloquium heard details of the reforms being undertaken by the African Development Bank (AfDB) to modernize its procurement system, including as regards the procurement of complex infrastructure projects. Details of the basis of the Bank's procurement policies drawing from its constitution, the consultation process and timelines were provided. One of the expected results would be a stronger reliance on institutional frameworks so as to achieve the standards of governance and effectiveness discussed earlier in the Colloquium, it was said, and thus the reform programme would be considering many of the issues raised. From this perspective, too, the African Development Bank confirmed its support for an UNCITRAL legislative text on PPPs.

95. It was agreed that a harmonized approach to key principles and procedures between the MDBs and UNCITRAL was important. Many States that might use an UNCITRAL text on PPPs would also be borrower countries from those banks, and capacity would be eroded should officials need to work with widely divergent systems. It was agreed that achieving consensus on updating the selection method in the PFIPs Instruments, in the light of the above issues, would again be feasible.

#### **10. Domestic preferences (A.CN.9/820, paras. 21-23)**

96. The sensitivity of the topic was underscored, in that many systems (including those of the MDBs and regional agreements on free trade) prohibited such preferences as regards covered procurement. Nonetheless, when the Model Law on Public Procurement had been developed, extensive discussions with States and such bodies had led to a carefully-crafted solution in that text. In essence, such preferences were permitted subject to international obligations, and to rigorous transparency and governance safeguards. It was agreed that this approach should be followed in a legislative text on PPPs.

97. The complexities in the PPPs environment would, it was added, need to be factored in to a legislative text on PPPs. Notably, preferences and other socioeconomic programmes to support SMEs and other disadvantaged groups would probably apply only at the sub-contract level, and quantification of preferences in the context of qualitative evaluation criteria and service delivery obligations would require further consultations and studies. The need to ensure appropriate qualifications from bidders subject to preferences was agreed to be critical at the practical level.

#### **11. Review and challenge mechanisms (A.CN.9/820, paras. 24-27)**

98. It was emphasized that a robust challenge mechanism would be vital to ensure effective participation in bidding for PPPs, and to implement the requirements of UNCAC article 9. It was agreed that the provisions in the Model Law on Public Procurement provided appropriate standards, and should apply to PPPs — for example by conferring competence as regards PPPs on the bodies that heard reviews and challenges in the public procurement context.

**12. Unsolicited proposals (A/CN.9/820, paras. 28-34)**

99. The extensive treatment of this controversial topic in the PFIPs Instruments, summarized in paras. 28-34 of document A/CN.9/820, was reviewed in detail. It was agreed that the essence of the approach should be maintained. It was reported that the experience of one country that had sought to legislate to permit unsolicited proposals had not been positive.

100. It was also reported that practice had showed considerable benefits from having a master infrastructure plan where unsolicited proposals were concerned. If all identified infrastructure needs were set out in that plan, it was said, there would be less reason for unsolicited proposals to be taken up. However, provisions on unsolicited proposals remained necessary because such master plans were in their infancy, and also to address unsolicited proposals that were in fact submitted. Although a private party might be able to identify a new public service need, potential service-providers were less likely to be able to quantify whether they were affordable and to demonstrate that the public sector or end-users should pay for the services concerned.

101. It was agreed that some updating to the provisions in the PFIPs Instruments would be necessary, but that the revisions would not be substantial.

**13. Provisions in legislation or contract (A/CN.9/820, paras. 35-40)**

102. The Colloquium agreed that potential benefits of regulating the contract terms could include simpler contract negotiations, reduced transaction costs, and better protection for the weaker party (normally the public authority, which would often have little experience in such projects). A major need was to ensure continuity of service provision. It was agreed that providing guidance on the terms of the project agreement was a key area for capacity-building that a PPP Unit should undertake.

103. The benefits of providing a set of suggested contents of the project agreement were agreed (as the PFIPs Instruments did), but that the extent to which legislation should set the terms themselves was acknowledged to be a much more sensitive issue.

104. On the one hand, standardizing terms and conditions, and other documents would reduce the need for specialists in negotiations and hence transaction costs and risks, and it was suggested that contract forms should be incorporated into the legislative framework.

105. On the other hand, representatives of the private sector had recommended full contractual freedom so as to ensure the project agreement was fully tailored to suit the project at hand. It was also suggested that tailoring indicative clauses in legislation would still mean that the content would vary significantly from case to case.

106. A significant aspect of the project agreement, it was observed, was provision for changes in the project. The notion of contract equilibrium raised earlier in the Colloquium was recalled — so that changes that would be inevitable in such a long-term contract would be possible and subject to appropriate compensation. This approach, it was suggested, would warrant the inclusion of core contract principles in the legislative framework.

107. After discussion, it was agreed that inclusion of certain contract terms in the legislative framework would be desirable, but the extent to which so doing would be feasible remained to be established. Thus this was one area in a legislative text on PPPs that would require significant additional work.

**14. Post-award disputes (A/CN.9/820, paras. 41-51)**

108. It was recalled that the consultants' surveys reported above, unlike those of the EBRD, had shown that compliance with the PFIPs Instruments on this subject was relatively weak.

109. The discussion on the topic set out in document A/CN.9/820 was considered in some depth. It was noted that a key issue for resolution was whether arbitration was



a suitable mechanism for the resolution of disputes arising at this phase of the project cycle and, if so, how suitable forums could be identified. The AfDB reported on its assessment of arbitration centres in the African region, which had identified that arbitration centres in at least three countries as well as recognized international centres had the capacity to arbitrate AfDB-funded contract disputes. The importance of confidence in such centres was underscored, meaning that those without long track records would need support.

110. Other issues for additional provision included guidance on national as compared with international forums for dispute resolution, and ensuring independence of the forum (an issue that had proved difficult at the national level, e.g. when challenging decisions of regulators and public authorities).

111. The critical importance of dispute prevention was emphasized, addressed at length in the existing Legislative Guide. Additional aspects would include guidance on the crucial role of selecting the law to govern the project and the forum for disputes, how to address non-arbitral elements, and local capacity. In addition, allowing an opportunity for investors to comment on proposed regulations that would affect a project would be an important prevention mechanism, it was noted.

112. Further work was agreed to be necessary to provide appropriate mechanisms to prevent and manage disputes other than those between the public authority and the project partner. Those disputes could arise between shareholders, lending parties, operational consortium partners, regulators and operators and contractors and sub-contractors. At a practical level, experience had indicated that international arbitration tended to allow a free choice of forum, whereas one approach suggested for addressing the many and varied disputes that might arise would require some steps to be exhausted before disputes could be brought before certain international forums.

113. In addition, some of the guidance in the Legislative Guide was considered overly theoretical, and a more practical approach would be helpful. It was agreed that the extensive experience in UNCITRAL in dispute prevention and resolution was such that agreeing legislative solutions on the outstanding issues would again be feasible.

## **15. Transparency and other issues (A/CN.9/820, paras. 52-59)**

114. The principle of transparency was critical for good governance in all aspects and phases of PPPs, it was agreed, and underpinned systems and regulation at the national and international levels. A transparent process was noted to be a pre-requisite for encouraging participation and for allowing effective monitoring and evaluation of projects.

115. Transparency was considered to be a tool for achieving accountability rather than a goal itself, however, and in this regard the key features of PPPs indicated a complex situation. For example, moves to encourage routine publication of public contracts did not account for changes to the contract, how to publicise equity transfers in the project, or how to treat the different types of information that such a contract would contain. For example, the contract terms governing the provision of public services would warrant different treatment from those covering confidential information. Additionally, there was little national experience on how to provide the resources necessary for the public sector and civil society effectively to assess performance throughout and at the end of the project.

116. A further aspect of transparency in which developments in practice were evident was the accounting treatment of PPPs, it was added. Traditionally, it was noted, the off-balance-sheet nature of PPPs (meaning that they did not add to public debt burdens) was seen as a key motivating factor for using PPPs, but Canada and other States had moved to require contingent liabilities and capital formation in PPPs to be brought into national accounts. Accounting standards were being developed at the national and regional level, and transparent budgeting procedures were being encouraged at both levels — relevant experience in this area in several States, including the United States and in the European Union, was shared.

117. Key performance indicators would need to be crafted by reference to the socioeconomic objectives of projects, as well as their cost-effectiveness, it was added. A legislative framework should, it was said, require those objectives to be articulated and publicly-available. It was agreed that ensuring accountability through transparency and other tools throughout a PPP would be very important in the UNCITRAL context, particularly given the link between PPPs and sustainable development targets. Although there was much current material on many aspects of transparency, achieving consensus on all transparency requirements would involve some sensitive issues and hence substantial work in the development of a legislative text on PPPs.

118. It was noted that other topics in the PFIPs Instruments identified as in need of revision included the authority to engage in PPPs, security interests and some further aspects of accounting and financial issues. It was agreed that achieving consensus on these issues was expected to be straightforward.

#### **16. Conclusions as regards scope of work to develop a legislative text on PPPs**

119. The Colloquium recalled that in all the key topics identified for consideration in the development of a legislative text on PPPs, the surveys and experience shared at the Colloquium indicated that consensus on the necessary provisions was feasible without work to develop new concepts, and within a relatively short time frame. There were only two limited exceptions to this conclusion, it was noted — the extent to which provisions should be in legislation or contract, and transparency. While further work would be required on these topics, it was nonetheless expected that a consensual legislative development would be achievable thereafter.

120. In the light of these conclusions, and the fact that the scope that the Colloquium had agreed to recommend to the Commission for such work would be limited to core PPPs, the Colloquium concluded that the scope of work proposed to be undertaken was as well-defined as it reasonably could be before such a project commenced. It was noted, however, that any mandate for development of a legislative text on PPPs should be sufficiently flexible to allow for issues that emerged during the development to be addressed.

#### **C. Nature of a future legislative text — Convention, Model Law, or Legislative Guide?**

121. The Colloquium heard a summary of the above three variants of UNCITRAL legislative text. It recalled the Commission's general preference for legislative provisions (rather than pure guidance). It was agreed that a Convention would not be feasible in the PPPs context, and so the Colloquium considered the relative benefits of a Model Law and Legislative Guide. Some participants highlighted that assisting States in legislative development was easier and more effective with a template law as a point of departure rather than a policy guide.

122. It was noted that a Model Law, offering a template law containing the essential principles and procedures for a national law, required guidance on its enactment, implementation and use if it were to function as intended. There would be limited options in a Model Law, but explanations would be needed to allow States to select the most appropriate option for local circumstances. A Legislative Guide, on the other hand, combined policy guidance and suggestions for legislative provision, but did not seek to provide a framework law per se. From this perspective, it was agreed that there was a spectrum of approaches to UNCITRAL legislative texts from Model Law to Legislative Guide.

123. Concerns raised about the use of a Model Law in the PPPs context set out in paragraph 68 of document A/CN.9/820 were recalled, i.e. ensuring the selection procedure was designed for the PPPs context, the need for a robust planning framework and the need to tailor a Model Law to local circumstances and other aspects of the regulatory framework. In the light of the discussions at the Colloquium, it was agreed that these issues would not in fact render a Model Law unachievable,

but that they highlighted the fact that a Model Law should be accompanied by a comprehensive guide to its enactment, use and implementation.

124. The appropriate form of text was further considered by reference to the varied needs of States with different levels understanding of and experience in PPPs, and at different stages of legislative development. It was suggested that for the States with the lower levels of such experience and development, a Model Law would be the most useful form of legislative text from UNCITRAL. States with more experience with PPPs would be better able to work with a Legislative Guide, as it combined limited legislative provisions upon which there was international consensus and policy guidance on other legislative provisions to be included in a national law. Such States would also be better able to adapt and update a Legislative Guide as necessary. States with very significant experience and understanding of PPPs would also be able to include novel approaches to PPPs in their legislative framework.

125. In the light of this analysis, and bearing in mind the need to address the infrastructure funding gap that was most acute in developing countries with the least PPPs experience, it was decided that the most effective form of legislative text for PPPs would be a Model Law. The Colloquium therefore recommended that the Commission consider the development of a Model Law on PPPs, supported by a comprehensive guide to its enactment.

126. The Colloquium also heard details of a draft Model Law on PPPs being produced by the Parliamentary Assembly of the Commonwealth of Independent States, an interstate body comprising parliamentary delegations from its 9 member States. The three goals of the project were the harmonization of legal rules (with the same goals that underpin UNCITRAL's work); the modernization of those rules and the development and dissemination of best practices and standards. It was noted that the regional nature of the project, among States with similar legal, cultural and economic backgrounds, meant that building consensus was perhaps easier than it would be in the worldwide context of UNCITRAL. The next draft, was understood to take on many of the emerging issues discussed during the Colloquium and was based on research into PPPs practices as is UNCITRAL practice, and was expected to be available in May 2014. This Model Law, it was explained, would also be supported by policy and legislative guidance.

127. The Colloquium recalled that the scope of the Model Law on PPPs that it was recommending to the Commission was agreed. Although that scope indicated that UNCITRAL would be able to come to consensus on the text of a Model Law relatively quickly, it was emphasized that many States were seeking to enact PPPs laws in the very short-term, and so would need assistance and guidance before a Model Law would be available in final form. It was noted that preparatory material for sessions of a Working Group — such as proposals for legislative texts — were published on the UNCITRAL website in all official United Nations languages before those sessions themselves. This process, together with inclusive deliberations and consensus-building at the sessions that were features of UNCITRAL negotiations, were agreed to be critical to encouraging States at all levels of development to participate, to enhance their understanding of PPPs as the process went on, and thus to enable them to commence PPPs reform in anticipation of the Model Law becoming available. The importance of UNCITRAL's formal working methods in the PPPs context was therefore emphasized.

128. Nonetheless, it was recognized that consultations between formal sessions would be necessary to ensure that the text was developed at as early date as possible, and to allow issues to be discussed as widely as possible. The representative of the Caribbean Development Bank, and those from States in Latin America, emphasized that this approach would facilitate the inclusion of experience from their regions. This approach would also allow necessary support for institutional reform to be addressed, in conjunction with the other agencies working to reform PPPs mentioned during the Colloquium, it was said.

## V. Conclusions

129. The Colloquium reaffirmed the importance of enabling PPPs to address the infrastructure funding gap that was vital to developing countries in particular. Experience with sub-standard and failing PPPs, it was added, underscored the need for an effective legislative model for States to use to develop best practices and standards so as to allow the potential for PPPs to make enormous contributions to sustainable economic and social development to be realised.

130. The Colloquium therefore recommended to the Commission that it provide a mandate for the development of a Model Law and accompanying Guide to Enactment on PPPs, as early as reasonably possible. It emphasized the benefits of undertaking such a project using UNCITRAL's formal working methods, and urged the Commission, taking into account the need to prioritize thematic areas of UNCITRAL's work, to explore all possibilities to facilitate legislative development on PPPs in this manner.

**F. Note by the Secretariat on planned and possible future work —  
Part III, Proposal by the Government of the United States of America:  
future work for Working Group II**

(A/CN.9/822)

[Original: English]

1. In preparation for the forty-seventh session of the Commission, the Government of the United States of America submitted to the Secretariat a proposal in support of future work in the area of international commercial conciliation. The English version of that note was submitted to the Secretariat on 30 May 2014. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

## Annex

As the draft Convention on Transparency in Treaty-Based Investor-State Arbitration<sup>1</sup> will be considered by UNCITRAL at its 47th Session, Working Group II (Arbitration and Conciliation) has completed the transparency-related projects within its mandate. The Commission now needs to decide what future projects, if any, might merit the use of Working Group resources. The United States proposes that the Working Group address the enforceability of settlement agreements resulting from international commercial conciliation.

**Background:** The United Nations General Assembly has recognized that the use of conciliation “results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States.”<sup>2</sup> Because promoting the use of conciliation may help achieve these benefits, UNCITRAL has previously developed two important instruments aimed at increasing its usage: the Conciliation Rules (1980) and the Model Law on International Commercial Conciliation (2002). (In this paper, as in the Model Law, the term “conciliation” is used to refer to “a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (‘the conciliator’) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.”<sup>3</sup> Thus, this paper does not intend to differentiate conciliation from mediation.)

When UNCITRAL completed this earlier work, it was already recognized that “[c]onciliation is being increasingly used in dispute settlement practice in various parts of the world,” and that it is “becoming a dispute resolution option preferred and promoted by courts and government agencies,” in part because of its high success rate.<sup>4</sup> Since then, conciliation’s acceptance and use have continued to grow. For example, in 2008, the European Union issued a directive on mediation, requiring that its member states implement a set of rules designed to encourage the use of mediation in cross-border disputes within the EU.<sup>5</sup> Increased use of conciliation can be expected as parties continue to seek options that reduce costs and provide faster resolutions.

One obstacle to greater use of conciliation, however, is that settlement agreements reached through conciliation may be more difficult to enforce than arbitral awards, if a party that agrees to a settlement later fails to comply. In general, settlement

<sup>1</sup> A/CN.9/812 (2014).

<sup>2</sup> A/Res/57/18 (2003).

<sup>3</sup> Model Law on International Commercial Conciliation, art. 1.3.

<sup>4</sup> Guide to Enactment of the Model Law on International Commercial Conciliation (“Guide to Enactment”), para. 8.

<sup>5</sup> Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, 2008 O.J. (L 136) 3.

agreements reached through conciliation are already enforceable as contracts between the parties.<sup>6</sup> However, enforcement under contract law may be burdensome and time-consuming. Thus, if even a successful conciliation simply results in a second contract that is as difficult to enforce as the underlying contract that gave rise to the dispute, engaging in conciliation to address a contractual dispute may be less attractive. Moreover, unlike arbitration, which generally provides a definitive resolution to a dispute, conciliation does not guarantee that the parties will reach an agreement, and even a party that agrees to a resolution may later fail to comply. Thus, in deciding whether to invest their time and resources in the process of conciliation, parties may want greater certainty that, if they do reach a settlement, enforcement will be effective and not costly. “Many practitioners have put forward the view that the attractiveness of conciliation would be increased if a settlement reached during a conciliation would enjoy a regime of expedited enforcement or would, for the purposes of enforcement, be treated as or similarly to an arbitral award.”<sup>7</sup> Thus, the Commission has supported “the general policy that easy and fast enforcement of settlement agreements should be promoted.”<sup>8</sup> Bolstering enforceability across borders also helps promote finality in settlement of cross-border disputes, as it reduces the possibility of parties pursuing duplicative litigation in other jurisdictions. For these reasons, initial consultations with the private sector have indicated strong support for further efforts by UNCITRAL to facilitate the enforceability of conciliated settlement agreements.

**Proposed Convention:** To further these goals, the United States proposes that Working Group II develop a multilateral convention on the enforceability of international commercial settlement agreements reached through conciliation, with the goal of encouraging conciliation in the same way that the New York Convention facilitated the growth of arbitration. Just as the New York Convention has been successful in part due to its relative brevity and simplicity, an analogous convention on conciliation should also avoid unnecessary complexity.

With respect to the scope of a convention, the United States proposes that the Working Group address the following issues, among others:

- Providing that the convention applies to “international” settlement agreements, such as when the parties have their principal places of business in different states;
- Ensuring that the convention applies to settlement agreements resolving “commercial” disputes, not other types of disputes (such as employment law or family law matters);
- Excluding agreements involving consumers from the scope of the convention;
- Providing certainty regarding the form of covered settlement agreements, for example, agreements in writing, signed by the parties and the conciliator; and
- Providing flexibility for each party to the convention to declare to what extent the convention would apply to settlement agreements involving a government.

The convention could then provide that settlement agreements falling within its scope are binding and enforceable (similar to Article III of the New York Convention), subject to certain limited exceptions (similar to Article V of the New York Convention).

Such an approach would build on existing law. To encourage use of conciliation, many legislative frameworks and sets of rules make some conciliated settlement agreements easier to enforce by treating them in the same manner as arbitral awards. For example, the UNCITRAL Model Law on International Commercial Arbitration (adopted in many jurisdictions around the world) provides in Article 30 that if parties settle a dispute during arbitral proceedings, the tribunal can make an award on agreed terms, with the same status and effect as any other award on the merits of a case. The result relies on a legal fiction: although the parties resolve the dispute themselves, rather

<sup>6</sup> Guide to Enactment, *supra* note 4, at para. 89.

<sup>7</sup> *Id.* para. 87.

<sup>8</sup> *Id.* para. 88.

than waiting for a neutral third-party decision maker to impose a resolution, the settlement is still categorized as an award. This fiction gives the parties the same benefits in terms of finality and ease of enforcement that a normal award would have provided.

Other jurisdictions have gone further by treating conciliated settlement agreements equivalently to arbitral awards even if arbitral proceedings have not yet commenced. These jurisdictions thus provide parties with an incentive to settle disputes at earlier stages. For example, UNCITRAL has noted that India and Bermuda provide for settlement agreements reached through conciliation to be treated as arbitral awards.<sup>9</sup> A number of U.S. states, including California and Texas, have statutes on international commercial conciliation that provide for settlement agreements to have the same legal effect as arbitral awards.<sup>10</sup> Various sets of arbitration rules around the world take a similar approach. The Korean Commercial Arbitration Board's Domestic Arbitration Rules provide that, if conciliation succeeds in settling a dispute before arbitration commences, "the conciliator shall be deemed to be the arbitrator appointed under the agreement of the parties, and the result of the conciliation shall ... have the same effect" as an award on agreed terms.<sup>11</sup> The Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce similarly provide that the parties can appoint the mediator as an arbitrator for the purpose of confirming a settlement agreement as an arbitral award.<sup>12</sup>

A convention for conciliation modelled on the New York Convention would draw upon the approach taken by these jurisdictions, but would address the enforceability of settlement agreements directly, rather than relying on the legal fiction of deeming them to be arbitral awards. This approach would also eliminate the need to initiate an arbitration process (with the attendant time and costs) simply to incorporate a settlement agreement into an award.

Any convention along these lines would, of course, need to include a limited set of exceptions similar, but not identical, to those provided in Article V of the New York Convention. For example, an analog to Article V(1)(d) (regarding the composition of the arbitral authority or the arbitral procedure) may not be necessary. By contrast, the Working Group could consider whether to allow a party to a settlement agreement to prevent enforcement if it can demonstrate that it was coerced into signing that settlement agreement.

The Working Group could also consider several possible structural limitations on enforcement under the convention:

- Whether to provide that other courts could give effect to an originating jurisdiction's determination that a settlement agreement is not enforceable (similar to the New York Convention's treatment of set-aside proceedings);
- How to avoid duplicative litigation caused by simultaneous attempts to enforce a settlement under the convention as well as under contract (or other) law; and
- How to ensure respect for restrictions on enforcement chosen by the parties to a settlement (e.g., settlements containing forum selection clauses or other limitations on remedies).

Moreover, settlement agreements can contain long-term obligations regarding the parties' conduct years into the future, and might address such issues more commonly than arbitral awards would. The Working Group should consider whether limits on enforcement under the convention would be appropriate in such cases. For example, enforcement under the convention could be made available only for a limited period of time, after which other mechanisms — such as domestic contract law — might be more appropriate (e.g., to deal with issues such as changed circumstances). Other

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<sup>9</sup> Id. para. 91 (citing Bermuda, Arbitration Act 1986; and India, Arbitration and Conciliation Ordinance, 1996, arts. 73-74).

<sup>10</sup> E.g., Cal. Civ. Pro. § 1297.401; Tex. Civ. Prac. & Rem. Code Ann. § 172.211.

<sup>11</sup> Korean Commercial Arbitration Board, Domestic Arbitration Rules 18.3 (2011).

<sup>12</sup> Arbitration Institute of the Stockholm Chamber of Commerce, Mediation Rules 14 (2014).

methods of limiting the convention's application to non-monetary elements of settlements could also be considered.

During the development of the Model Law on International Commercial Conciliation, it was noted that drafting uniform legislation regarding enforcement would be difficult because the methods for achieving expedited enforcement of settlement agreements varied greatly between legal systems and depended on domestic procedural law.<sup>13</sup> However, the Working Group could minimize these difficulties by addressing enforcement via a convention that, like the New York Convention, sets forth the result that states would need to provide through their domestic legal systems (in this case, enforcement of conciliated settlement agreements) without trying to harmonize the specific procedure for reaching that goal.<sup>14</sup>

Similarly, efforts to develop a convention should not seek to develop harmonized rules for the conciliation process itself, just as the New York Convention does not set forth mandatory rules for conducting arbitral proceedings. However, the Working Group could consider whether additional topics, such as the confidential nature of conciliation discussions, could be addressed through further projects after completion of an initial convention.

**Next Steps:** In view of the potential benefits of such a convention, as well as the background work already done by the Secretariat in the context of the development of the Model Law, the United States urges the Commission to assign this project the highest priority within the Working Group, including at its next session in September 2014. While other efforts under consideration by the Working Group (such as updating the Notes on Organizing Arbitral Proceedings) should continue, they should not delay work on this project.

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<sup>13</sup> Guide to Enactment, *supra* note 4, at para. 88.

<sup>14</sup> Similarly, although this convention would provide for enforcement of settlement agreements, it would not address matters related to the attachment or execution of assets, just as the New York Convention did not do so.



**G. Note by the Secretariat on planned and possible future work —  
Part IV, Proposal by the Government of Canada: possible future work  
on electronic commerce — legal issues affecting cloud computing**

(A/CN.9/823)

[Original: English and French]

1. In preparation for the forty-seventh session of the Commission, the Government of the Canada submitted to the Secretariat a proposal in support of future work in the area of cloud computing. The English and French versions of that note were submitted to the Secretariat on 19 June 2014. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

## **Annex**

### **I. Introduction**

1. Pursuant to the mandate from the 44th Commission Session in 2011, Working Group IV on Electronic Commerce (Working Group) has carried out its work on electronic transferable records, including certain aspects of other topics identified as warranting the attention of UNCITRAL, such as identity management, use of mobile devices in electronic commerce and electronic single window facilities.<sup>1</sup> For the 47th Commission Session, the Working Group will report on the work of its 48th and 49th Sessions. The work on model provisions for electronic transferable records is progressing. As such, it may be time for the Commission to consider future work in the field of electronic commerce.

### **II. Cloud computing and related legal issues in cross-border context**

2. In recent years cloud computing has progressed rapidly and is now widely used in many sectors of business activities as well as by public sector bodies. Cloud computing can generically be defined as computing services (e.g., data hosting or data processing) over the Internet. It requires a form of restricted access which is granted to a defined group of individuals, such as the employees of a business. What is often difficult for the layman to conceptualize is that it involves a variety of configurations of computer hardware (or group of computing hardware) called servers. Individual users, once they have been granted access, can use the servers' processing power to run an application, store data, or perform any other computing task. It is described as "cloud" because the computing is not done on one's personal computer or on the business' own computer system, but elsewhere through an Internet connection. In effect, cloud computing limits the need for in-house computer networks, servers and even personal computers because instead of using these devices or in-house networks to perform computing functions, the applications and computing capacities of the service provider are used. Using cloud computing can greatly facilitate the conduct of business by reducing costs and increasing mobility of users.

3. Despite the advantages of cloud computing, businesses may be reluctant to use it because of issues of reliability, security of confidential information such as trade secrets, the absence of physical presence of the service provider in the jurisdiction, standard contract clauses perceived to be too slanted in favour of the cloud provider, the rigidity of the models proposed by service providers that are unable to satisfy legal requirements of the client, and many other reasons.

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<sup>1</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 238-239.

### III. Why would work on identifying legal issues associated with cloud computing be useful

4. Given the importance of cloud computing in today's business world and its increasing use both domestically and in a cross-border context, it would be useful for UNCITRAL to carry out work on the legal issues affecting parties to a cloud computing arrangement. Outlining the legal risks associated with entering into contractual cloud computing agreements would be useful to private parties for the protection of their interests and in the assessment of how they carry on business. The consideration of cross-border cloud computing services by UNCITRAL would also contribute to the development of international trade by reducing or removing obstacles in international trade and by identifying opportunities for harmonization of practices and laws.

5. Cloud computing raises a number of contractual as well as other legal issues. Although intellectual property rights on software and privacy issues, including the determination of the applicable privacy law, have been identified and potentially create significant challenges in practice, the current proposal excludes intellectual property and privacy from the scope of the work proposed and is restricted to contractual issues affecting hosts, clients and users of cloud computing and related jurisdictional issues. It is limited to the preparation of a document outlining the cloud computing contractual relationships and legal issues that arise in that context. Without prescribing the form of such a document, it could be a checklist or a more detailed list of considerations for cloud users similar to other UNCITRAL documents in other fields, such as the *Notes on Organizing Arbitral Proceedings (1996)*, *Recognizing and Preventing Commercial Fraud: Indicators of Commercial Fraud (2013)*, or the *Legal Guide on International Countertrade Transactions (1992)*. The following paragraphs contain a list of issues that could be considered. The list is intended to be an illustration of the contractual aspects that could be considered and is non-exhaustive.

6. First, what are the duties and responsibilities of each participant to cloud agreements? Security standards of cloud providers are not regulated, depend on assertions that are difficult to verify for most clients and are supported by contracts that may be difficult to enforce in practice because of servers located in unknown places and interlinked with unknown servers. This raises issues about the compliance obligations to domestic laws, which in some cases might conflict. Can the duties and responsibilities be enforced and allocated in a cross-border context? What duties does the service provider have towards preserving the integrity of the data? What remedies are available in cases where the integrity of the data has been compromised? Can guidance be provided to service providers and applicants for the assessment and negotiation of contractual obligations? For example, what duties does the service provider have in relation to business losses due to the unavailability of the service? Under what terms can a cloud agreement be terminated? What happens to the data when the contract is terminated?

7. Second, secured access to cloud data hosting servers requires that adequate identity management protocols be established. It seems largely accepted that any identity management system is based to a large extent on a contractual framework. The contractual framework allocates obligations, risks and liabilities. However, is any contractual framework acceptable or should best practices be established? In addition, how does States' domestic legislation apply to accepted identity management protocols? What do courts accept as reasonable practices and what do they consider being negligent practices?

8. Third, data hosting is governed by a contractual agreement between the service provider and the person, the applicant, wishing to make cloud data hosting available to a specific group of individuals (typically employees or clients). These contracts often contain standard terms from the service providers but may also be negotiated between the parties. Who owns the data under these agreements? Users, although not typically party to the contractual agreements, may see their rights and obligations affected by using cloud computing (i.e., where personal information is entered and

stored, where users negligently give access to data to unauthorized third parties). How are third parties and third parties-related information affected by cloud computing agreements?

9. Fourth, the cloud service agreement can raise issues of conflict of laws. These conflicts can take place in relation to the various aspects of the contracts, which for different reasons are not subject to the same law. (For example, in some situations users are not party to the service agreements and are therefore not affected by a choice of law clause in the service agreement. In other situations, by application of public policy in various States, including consumer protection, privacy legislation and protection of confidential information legislation, different laws come into play.) These issues are likely to become increasingly prevalent, as well as more complex, in light of the fact that many cloud providers use multi-jurisdictional locations for their servers and operations.

10. Similarly, the interaction between choice of jurisdiction and jurisdictional rules on the one hand and public policy and connecting factors used to determine jurisdiction of a court on the other hand could lead to important challenges in practice. For example, would a choice of applicable law and jurisdiction between the service provider and the service applicant pointing to State A validly oust jurisdiction of the national courts in State B where a user is located? More generally, should the host be subject to disclosure requirements even though it has very limited connection to the jurisdiction ordering disclosure?

11. Fifth, what practical and effective measures to limit risks should be put in place by service providers? For example should service providers be encouraged to offer multi-tiered access with varying access privileges (i.e., not all personal information about an entity is accessible to all users)? Should they be required to inform potential clients of the availability or unavailability of such safeguards and multi-tiered access functions? Should they contract liability insurance and who should be responsible for insuring a particular risk? Is the cloud computing and related legal issues different in the government context versus in the business context and should different standards apply? Should the service provider be required to disclose that access to the data can be granted to a given State authority in the conduct of special investigative powers? Is the existence of legislation on the protection of personal information and compliance by the service provider with the legislation sufficient to exonerate the provider from liability?

#### **IV. Work to be carried out by UNCITRAL**

12. The Commission could request the Secretariat to gather information relating to cloud computing, and in particular to data hosting, software as a service (SaS), and other prevalent cloud computing solutions, and prepare a document outlining existing practices. Where appropriate the document could stress potential risks stemming from current practices in relation to conflict of laws, the lack of supporting legislative provisions in national laws giving effect to data hosting-related agreements, and the lack of harmonization of domestic laws. The work could be done in collaboration with The Hague Conference on Private International Law where issues of conflicts of laws are being considered. The document could outline where best practices are needed based on evidence of absence of legal recourses, perceived imbalance between the rights and obligations of cloud computing participants or other evidence. Finally, the document could point to work done by other organizations in relation to cloud computing, notably in relation to privacy and the protection of personal information, with the view of identifying gaps in the international trade law framework. The document could then be used by the Working Group to identify issues in need of practical legislative or other solutions and to discuss possible future work.



## VIII. CASE LAW ON UNCITRAL TEXTS (CLOUT)

The secretariat of the United Nations Commission on International Trade Law (UNCITRAL) continues to publish court decisions and arbitral awards that are relevant to the interpretation or application of a text resulting from the work of UNCITRAL. For a description of CLOUT (Case Law on UNCITRAL Texts), see the users guide (A/CN.9/SER.C/GUIDE/1/Rev.2), published in 2000 and available on the Internet at [www.uncitral.org](http://www.uncitral.org).

A/CN.9/SER.C/ABSTRACTS may be obtained from the UNCITRAL secretariat at the following address:

UNCITRAL secretariat  
P.O. Box 500  
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A-1400 Vienna  
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Telephone (+43-1) 26060-4060 or 4061  
Telefax: (+43-1) 26060-5813  
E-mail: [uncitral@uncitral.org](mailto:uncitral@uncitral.org)

They may also be accessed through the UNCITRAL homepage on the Internet at [www.uncitral.org](http://www.uncitral.org).

Copies of complete texts of court-decisions and arbitral awards, in the original language, reported on in the context of CLOUT are available from the secretariat upon request.



# IX. TECHNICAL ASSISTANCE TO LAW REFORM

## Note by the Secretariat on technical cooperation and assistance

(A/CN.9/818)

[Original: English]

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## I. Introduction

1. Pursuant to a decision taken at its twentieth session in 1987, technical cooperation and assistance activities aimed at promoting the use and adoption of its texts represent one of the priorities of the United Nations Commission on International Trade Law (UNCITRAL).<sup>1</sup>

2. In its resolution 67/89 of 14 January 2013, the General Assembly reaffirmed the importance, in particular for developing countries and economies in transition, of the technical cooperation and assistance work of the Commission and reiterated its appeal to bodies responsible for development assistance, as well as to Governments in their bilateral aid programmes, to support the technical cooperation and assistance programme of the Commission and to cooperate and coordinate their activities with those of the Commission.

3. The General Assembly welcomed the initiatives of the Commission towards expanding, through its Secretariat, its technical cooperation and assistance programme, and noted with interest the comprehensive approach to technical cooperation and assistance, based on the strategic framework for technical assistance suggested by the Secretariat to promote universal adoption of the texts of the Commission and to disseminate information on recently adopted texts.

4. The General Assembly also stressed the importance of promoting the use of texts emanating from the work of the Commission for the global unification and

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<sup>1</sup> *Official Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17)*, para. 335.

harmonization of international trade law, and to this end urged States that have not yet done so to consider signing, ratifying or acceding to those conventions, enacting model laws and encouraging the use of other relevant texts.

5. The status of adoption of UNCITRAL texts is regularly updated and available on the UNCITRAL website. It is also compiled annually in a note by the Secretariat entitled "Status of conventions and model laws" (for the Commission's forty-seventh session, see A/CN.9/806).

6. This note sets out the technical cooperation and assistance activities of the Secretariat subsequent to the date of the previous note submitted to the Commission at its forty-sixth session in 2013 (A/CN.9/775 of 1 May 2013), and reports on the development of resources to assist technical cooperation and assistance activities.

7. A separate document (A/CN.9/809) provides information on current activities of international organizations related to the harmonization and unification of international trade law and on the role of UNCITRAL in coordinating those activities.

## II. Technical cooperation and assistance activities

### A. General approaches

8. Technical cooperation and assistance activities undertaken by the Secretariat aim at promoting the adoption and uniform interpretation of UNCITRAL legislative texts. Such activities include providing advice to States considering signature, ratification or accession to UNCITRAL conventions, adoption of an UNCITRAL model law or use of an UNCITRAL legislative guide.

9. Technical cooperation and assistance may involve: undertaking briefing missions and participating in seminars and conferences, organized at both regional and national levels; assisting countries in assessing their trade law reform needs, including by reviewing existing legislation; assisting with the drafting of national legislation to implement UNCITRAL texts; assisting multilateral and bilateral development agencies to use UNCITRAL texts in their law reform activities and projects; providing advice and assistance to international and other organizations, such as professional associations, organizations of attorneys, chambers of commerce and arbitration centres, on the use of UNCITRAL texts; and organizing training activities to facilitate the implementation and interpretation of legislation based on UNCITRAL texts by judges and legal practitioners.

10. Design and implementation of technical cooperation and assistance activities took place in line with the priorities lines of action for such activities, which included: stressing a regional and subregional approach in order not only to achieve economies of scale but also to complement ongoing regional integration initiatives; promoting the universal adoption of those international trade law texts already enjoying wide acceptance, and making particular efforts to disseminate information on recently adopted texts, with a view, if such texts were treaties, to fostering their early adoption and entry into force (A/66/17, para. 255).

11. Some of the activities undertaken in the relevant time period are described below. Activities denoted with an asterisk were funded by the UNCITRAL Trust Fund for Symposia.

#### Initiatives for a regional approach

12. The Secretariat continued participation in the second phase of the Asia-Pacific Economic Cooperation (APEC) Ease of Doing Business Project on enforcing contracts in cooperation with the Ministry of Justice of the Republic of Korea. The project aims at strengthening the legislative and institutional framework for the enforcement of contracts in APEC economies. In 2013, the project focused on Brunei Darussalam and Viet Nam (Bandar Seri Begawan, and Hanoi, 25 May-5 June 2013)\*. In addition to these economies, the Ministry of Justice of the Republic of Korea decided to expand its project to non-APEC economies, with Saudi Arabia being the



first target State (Riyadh, 3-9 May 2013)\*. The three States had all recently reformed their arbitration law and thus their legislation as well as the supporting environment were analysed. None of the three States are parties to the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (the “CISG”)<sup>2</sup> and thus the importance of becoming a party to the international trade regime was also highlighted. With the increasing importance of electronic commerce in those States, UNCITRAL texts on electronic commerce were also promoted. The above-mentioned measures were recommended during the wrap-seminar (Seoul, 29-31 October 2013)\* as a way of improving the legal environment for enforcing contracts in those States, particularly with respect to foreign trade and investment. The Secretariat’s participation in the project has been made possible through the continued voluntary contribution received from the Government of the Republic of Korea.

13. The Secretariat delivered a presentation on UNCITRAL’s efforts in the harmonization of law, at the Middle Eastern regional conference “The 2010 Unidroit Principles of International Commercial Contracts in light of international conventions and national laws: Launch of the Arabic version of the 2010 Principles”, organized in the framework of The Protection Project at the Johns Hopkins University School of Advanced International Studies (Muscat, 23-24 March 2014).

14. Additional information on the regional technical assistance and cooperation activities of the UNCITRAL Regional Centre for Asia and the Pacific is available in the dedicated report (A/CN.9/808).

#### **Promotion of the universal adoption of fundamental trade law instruments**

15. The Secretariat has continued to engage in promoting the adoption of fundamental trade law instruments, i.e., those treaties that are already enjoying wide adoption and the universal participation to which would therefore seem particularly desirable.

16. The treaties currently considered under that approach are the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)<sup>3</sup> (the “New York Convention”, a United Nations convention adopted prior to the establishment of the Commission, but actively promoted by the Commission), whose universal adoption has already been explicitly called for by the General Assembly,<sup>4</sup> and the CISG.

#### **Promotion of recent treaties**

17. The Secretariat continues to promote recently adopted treaties in order to encourage their signature and adoption by States with a view to facilitating their early entry into force and, when already in force, to consolidate their status as globally accepted standards. Treaties currently considered under that approach include the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)<sup>5</sup> and the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the “Rotterdam Rules”).<sup>6</sup>

## **B. Specific activities**

### **Sale of goods**

18. The Secretariat has continued to pursue broader adoption of the CISG. Accessions to the text have been supported by dedicated workshops and conferences as well as by bilateral meetings and other interaction. Examples of such meetings include the international conference on “The United Nations Convention on Contracts

<sup>2</sup> United Nations, *Treaty Series*, vol. 1489, No. 25567.

<sup>3</sup> United Nations, *Treaty Series*, vol. 330, No. 4739.

<sup>4</sup> United Nations General Assembly, Resolution 62/65 of 8 January 2008, para. 3.

<sup>5</sup> General Assembly resolution 60/21, annex.

<sup>6</sup> General Assembly resolution 63/122, annex.

for the International Sale of Goods: an opportunity for growth” organized with the Colegio de Abogados y Abogadas de Costa Rica in San José, Costa Rica, on 19 November 2013. The CISG was also discussed at the workshop on UNCITRAL texts on sale of goods and electronic commerce organized at the request of the Ministry of Commerce of Côte d’Ivoire by the International Trade Center (INTRACEN) in the framework of the project PACIR (Programme d’appui au commerce et au l’intégration régionale) and held in Abidjan, Côte d’Ivoire on 17-18 December 2013.

19. The Secretariat has also continued to support States in the process of revision of declarations lodged upon becoming party to the CISG, with a view to reconsidering them, where appropriate, in order to further harmonize the scope of application of the convention. The outcome of such process is reflected in the corresponding changes in the CISG treaty status (see A/CN.9/806).

20. In addition, the Secretariat remains active in promoting uniform interpretation of the CISG, both through activities related to the Case law on UNCITRAL texts (CLOUT) and through delivery of targeted trainings for judges, practitioners and students. These trainings have included delivery of an address on the use of CISG and other sales texts in arbitration at the annual Slovenian Arbitration Conference at the Chamber of Commerce and Industry of Slovenia (Ljubljana, 4 November 2013)\*; presentation on interpretation of electronic commerce issues under the CISG during a round-table discussion and lecture for students at the Faculty of Law, Holy Spirit University of Kaslik (Jounieh, Lebanon, 29-30 April 2014)\*; and provision of a CISG seminar at the Faculty of Law, University of Vienna (Vienna, 28 October-7 November 2013).

### **Dispute resolution**

21. The Secretariat has been engaged in the development of instruments and tools to provide information on the application and interpretation of UNCITRAL texts in the field of dispute settlement. The Secretariat has also been engaged in training activities, in the promotion of instruments relating to arbitration and conciliation as well as in supporting ongoing legislative work. Given the high rate of adoption of these texts, the demand for technical assistance in the field of dispute resolution remains particularly acute.

(i) *Development of instruments and tools to provide information on the application and interpretation of UNCITRAL texts in the field of dispute settlement*

22. Regarding the New York Convention, a website ([www.newyorkconvention1958.org](http://www.newyorkconvention1958.org)) has been established in order to make the information gathered in the preparation of the UNCITRAL guide on the New York Convention publicly available.

23. Regarding the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (the “Model Law on Arbitration”),<sup>7</sup> the Secretariat is currently working on updating the 2012 Digest of Case Law on the Model Law on International Commercial Arbitration.<sup>8</sup>

(ii) *Supporting ongoing legislative work and training activities*

24. The Secretariat has provided comments on legislation on arbitration, including for the Governments of Albania, Belgium, Indonesia, Lithuania, Mongolia, Portugal, state of Georgia (United States of America) and Viet Nam.

25. The Secretariat participated in a preparatory meeting of a conference on the New York Convention within the framework of an ongoing project on economic and legal reform organized by the Commercial Law Development Program (CLDP), United States Department of Commerce. Topics included international arbitration,

<sup>7</sup> United Nations publication, Sales No. E.08.V.4.

<sup>8</sup> Available from [www.uncitral.org/uncitral/en/case\\_law/digests.html](http://www.uncitral.org/uncitral/en/case_law/digests.html).

international sales contracts, intellectual property, documentary credit and international partnerships (Bagdad, 30 June-3 July).

26. The Secretariat also contributed, within the framework of an ongoing regional legal reform project “Open Regional Fund - Legal reform” (ORF-LR) of the Deutsche Gesellschaft für Internationale Zusammenarbeit (“GIZ”), to a project on arbitration rules of arbitral institutions and on the application of the New York Convention (Skopje, 12-14 July).

27. The UNCITRAL Regional Centre for Asia and the Pacific co-organized, with the Ministry of Justice of the Republic of Korea and the Korean Commercial Arbitration Board, a conference on “Arbitration Reform in the Asia Pacific Region: Opportunities and Challenges” (Seoul, 11-12 November 2013).

28. The Secretariat co-organized, with the Austrian Arbitration Association, the International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC), the International Chamber of Commerce Austria and the Young Austrian Arbitration Practitioners (YAAP), the Vienna Arbitration Days (Vienna, 28 February-1 March 2014).

29. Other events on international arbitration in which the Secretariat participated or contributed include:

(a) The fifth Biennial Asia Pacific Regional Arbitration Group Conference 2013, where the Secretariat delivered a keynote speech aimed at raising awareness on UNCITRAL work and took part in panel discussions on treaty-based investment arbitration, introducing the newly adopted UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration<sup>9</sup> (Beijing, 26-30 June 2013);

(b) The 10th Anniversary Conference of the Master Program in International Commercial Arbitration Law (ICAL) at Stockholm University: “Mastering the Challenges in International Arbitration” — co-organized by the Stockholm University, Swedish Arbitration Association, Arbitration Institute of the Stockholm Chamber of Commerce and UNCITRAL (Stockholm, 29-30 August 2013);

(c) An UNCTAD conference on economies in transition, where the Secretariat made a presentation to promote the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (Sarajevo, 2-3 October 2013);

(d) A seminar organized by the BANI Arbitration Centre of Indonesia and the Indonesian Institute of Arbitrators on the Model Law on Arbitration and on reform of Indonesian Arbitration Law: “Is the Indonesian Arbitration Law Friendly to Business?” (Jakarta, 30 September-4 October 2013);

(e) An international conference on “Costs of International Arbitration: Criticalities and Solutions” organized by ISPRAMED and the Istanbul Chamber of Commerce (Istanbul, 7-8 October 2013);

(f) The Hamburg Lectures series, upon invitation by the Hamburg University, Institute of Law and Economics (Hamburg, Germany, 30 October 2013);

(g) The annual Slovenian Arbitration Conference at the Chamber of Commerce and Industry of Slovenia, where the Secretariat presentation aimed at promoting UNCITRAL texts in the region (Ljubljana, 4 November 2013)\*;

(h) A conference organized by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine (Kiev, 14-15 November 2013);

(i) The UNCTAD Regional Training Course, where the Secretariat made a presentation on the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration (21 November 2013, via videoconferencing);

(j) The conference organized jointly by UNCITRAL, the International Arbitration Institute (IAI) and the Geneva Centre for International Dispute settlement

<sup>9</sup> Available from [www.uncitral.org/uncitral/uncitral\\_texts/arbitration.html](http://www.uncitral.org/uncitral/uncitral_texts/arbitration.html).

(CIDS) on “Concurrent Proceedings in Investment Disputes” (Paris, 22 November 2013);

(k) The Singapore International Arbitration Academy 2014 where the Secretariat made a presentation on the current work of UNCITRAL on transparency and on the project on the New York Convention (Singapore, 29 November 2013)\*;

(l) The 24th Meeting of the Energy Charter Conference, Ministerial Session, “15 Years of Energy Investment Promotion and Protection under the Energy Charter Treaty” where the Secretariat delivered a presentation on the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and on the current work of UNCITRAL on the preparation of a convention on transparency (Nicosia, 5 December 2013);

(m) The OECD conference on arbitration in the Mediterranean: “Fostering Infrastructure Investment in the MENA Region: Mitigating Risk in Uncertain Times”; the Conference also formally launched the MENA-OECD Working Group on Investment Security in the Mediterranean (ISMED) (Paris, 8-10 December 2013);

(n) A training seminar at the Uppsala University Master’s Programme in International Investment Arbitration (Uppsala, Sweden, 29 January 2014);

(o) A training seminar on arbitration at the Magistrate School and the Faculty of Law (Tirana, 4-7 February 2014);

(p) A conference jointly organized between the British Institute of International and Comparative Law and UNCITRAL where the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the draft convention on transparency were presented (London, 20 March 2014);

(q) The sixth Belgrade Arbitration Conference on Arbitrators’ Powers and Party Autonomy (Belgrade, 4 April 2014); and

(r) Attended the twenty-second International Council for Commercial Arbitration (ICCA) Biennial Congress on legitimacy of arbitration (Miami, Florida, United States, 6-9 April 2014).

30. In the field of mediation, the Secretariat made a presentation on the UNCITRAL Model Law on International Commercial Conciliation (2002)<sup>10</sup> and the UNCITRAL Conciliation Rules (1980)<sup>11</sup> in the framework of the International Institute for Commercial Law’s Online Certificate Program in International Commercial Law and International Alternative Dispute Resolution (4 October, via videoconferencing).

### **Electronic commerce**

31. The Secretariat has continued promoting the adoption of UNCITRAL texts on electronic commerce, including in cooperation with other organizations and emphasizing a regional approach. In that framework, the Secretariat has provided comments on draft regional and national legislation and engaged in informal consultation with legislators and policymakers from various jurisdictions.

32. Relevant activities included:

(a) Delivering a presentation on the legal framework for electronic commerce, at the 3rd Arab Forum for Electronic Transactions and Exchange, upon invitation by the Arab Information and Communication Technology Organization to promote UNCITRAL texts in the Arab region (Tunis, 24-25 September 2013)\*;

(b) Delivering a presentation on an enabling legal framework for paperless trade, emphasizing the need for a general legal framework for e-transactions and

<sup>10</sup> *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17)*, annex I.

<sup>11</sup> *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17)*, chap. V, sect. A, para. 106.

harmonization in ECO states to promote cross-border trade (Tabriz, Islamic Republic of Iran, 2-3 October 2013)\*;

(c) Delivering a presentation at the first and second exploratory seminar E-signatures for E-business Transactions in Euromed (Europe and Southern Mediterranean) Region organized by the European Commission and also in cooperation with the Union for Mediterranean (UFM), with a view to increasing cross-border usage of e-signatures and trust services and gathered information about the use of electronic signatures in the region (Amman, 11-12 November 2013 and Barcelona, Spain, 22-23 January 2014)\*; and

(d) Participating at the workshop “Harmonizing Cyber Legislation in the ECOWAS Region” organized by UNCTAD, ECOWAS, ACCP, COE and UNAFRI in an effort to coordinate and gather information on law reform efforts in the ECOWAS region (Accra, 17-20 March 2014)\*.

33. As a result of those activities, additional States became a party to the United Nations Convention on the Use of Electronic Communications in International Contracts and new national enactments of legislation on electronic commerce and electronic signatures were recorded (for additional details, see A/CN.9/806).

### Procurement

34. In accordance with requests of the Commission and Working Group I (under its former mandate on Public Procurement), the Secretariat has established links with other international organizations active in procurement reform to foster cooperation with regard to the UNCITRAL Model Law on Public Procurement (2011) (the “Model Law”)<sup>12</sup> and its accompanying Guide to Enactment (2012).<sup>13</sup>

35. The aims of such cooperation are to ensure that reforming Governments and organizations are informed of the policy considerations underlying those texts, including as regards regional requirements and circumstances, so as to promote a thorough understanding and appropriate use of the Model Law.<sup>14</sup> The Secretariat is taking a regional approach to this cooperation, and activities with the multilateral development banks in several regions, focusing on encouraging sustainable development, good governance and the avoidance of corruption (in which procurement reform plays a pivotal role), are under way.

36. To this end, the Secretariat has participated as speaker/presenter at a wide range of international events, including:

(a) Participation as a speaker on a range of procurement topics in an OECD procurement workshop for MENA countries and workshop for Iraq (Kuwait, 15-17 May 2013 and 21-24 April 2014)\*;

(b) Participation as a speaker on “Framework Agreements as a Centralized Purchasing Technique from the UNCITRAL Perspective” at the 9th Public Procurement Knowledge Exchange Platform held under the theme “Efficient Implementation of Procurement--Centralized Purchasing”, co-sponsored by ADB, EBRD, IDB and the World Bank, and in cooperation with SIGMA (Skopje, 28-31 May 2013);

(c) Participation as a speaker at a regional conference organized by the Commercial Law Development Program of the United States Department of Commerce, held in collaboration with Algeria, Libya, Morocco, and Tunisia, on Best Practices in Public Procurement, addressing a range of topics, to assist these countries with developing policies and procedures consistent with international best practices, and to encourage SME development (Casablanca, Morocco, 28-31 May 2013);

<sup>12</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17), annex I.*

<sup>13</sup> Available at [www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html).

<sup>14</sup> See documents A/CN.9/575, paras. 52 and 67, A/CN.9/615, para. 14, and A/66/17, paras. 186-189.

(d) Presentation of papers and chairing workshops at the Global Revolution VI Conference, an international event on developments in public procurement regulation, addressing the challenges in implementing the Model Law (Nottingham, United Kingdom of Great Britain and Northern Ireland, 24-25 June 2013);

(e) At the invitation of the Organismo Supervisor de las Contrataciones del Estado (“OSCE”) and in collaboration with the IADB, leading a workshop in Peru, to address how the Model Law can strengthen the Government Procurement Law regulated by OSCE (Lima, 1-5 July 2013)\*;

(f) Within the framework of an EBRD/UNCITRAL Initiative on Enhancing Public Procurement Regulation in the CIS countries and Mongolia: Presentation of the Model Law and supporting Guide to Enactment at (i) the 4th in a series of regional seminars on implementation of the Model Law in the CIS countries and Mongolia, in cooperation with the EBRD (Ulan Bator, 3-8 June 2013) (postponed from October 2012)\*; (ii) a Regulatory Capacity-Building Session for Kazakhstan, and policy advice for public procurement reforms sessions for the Kyrgyz Republic and Tajikistan (London, 8-10 July 2013)\*, (iii) a Workshop on Policy Advice for Public Procurement Reform in the Kyrgyz Republic in connection with the WTO GPA accession process (Bishkek, 5-6 November 2013)\*; and (iv) Attendance at six-monthly review meetings of the progress on the Initiative and activities in cooperation with other development partners, such as OECD, OECD-SIGMA, ADB, IsDB, EIB, and others (London, 10 July 2013 and 10 January 2014);

(g) Participation in a panel on framework agreements in public procurement at the IBC Legal (Informa Group) European Public Procurement Forum (Brussels, 26 September 2013);

(h) Participation in the OECD Task Force on Procurement, co-chaired by the World Bank and the AfDB, to consider revisions to the OECD-DAC methodology for the assessment of public procurement systems, and the establishment of a global community of practice for public procurement (Rabat, Morocco, 6-9 October 2013)\*;

(i) Participation in a Regional Workshop on Government Procurement for Central and Eastern Europe, Central Asia and the Caucasus, organized by the UNODC and hosted by IACA, under the “Public-Private Partnership for Probity in Public Procurement” (Vienna, 23-25 October 2013);

(j) Participation in a “PPPs day” at the 2013 Global Forum Law, Justice and Development (LJD) Week, hosting one of three sessions on PPPs, exploring how PPPs can be used to promote sustainable economic and social development, and considering the need for better regulation of the tool (Washington, D.C., 18-22 November 2013);

(k) Provision of technical assistance to the Government of Jamaica, in cooperation with the IADB, using the Model Law as the basis of a first national procurement law (Kingston, 22-29 November 2013);

(l) Participation in the OECD’s 7th Annual Meeting of Senior PPP Officials, exploring legal and policy issues in PPPs and the need for further legal work in this area (Paris, 17-18 February 2014);

(m) Participation as a presenter to discuss common challenges in public procurement policy at the 1st Brazilian Series of Conferences on Public Procurement and Concession Design (Rio de Janeiro and Brasilia, Brazil, 24-27 March 2014); and

(n) Delivery of two workshops for regulators and procurement officials for the Zambia Public Procurement Authority, on the implementation of framework agreements in public procurement, based on the Model Law (Lusaka, 31 March-4 April 2014).

*Supporting ongoing legislative work and training activities*

37. The Secretariat has provided advice to the Governments of Jamaica and Trinidad and Tobago (with the support of the IADB) and to the Kyrgyz Republic and Tajikistan (within the framework of the EBRD/UNCITRAL Initiative on Enhancing Public Procurement Regulation in the CIS countries and Mongolia) on reform of their public procurement legal and regulatory framework.

38. The Secretariat has contributed to a UNODC “Guidebook on anti-corruption in public procurement and the management of public finances — Good practices in ensuring compliance with Article 9 of the United Nations Convention Against Corruption”, which addresses how the Model Law fulfils the procurement-related requirements of that Convention.

39. The Secretariat has participated as a lecturer in (i) the programme of an Executive LL.M. in Public Procurement Law and Policy, (University of Nottingham, United Kingdom, 11-12 January 2014); (ii) the 7th and 8th editions of the ITC-ILO-University of Turin Master Course in Public Procurement Management for Sustainable Development (Turin, Italy, 18 June 2013, 3-4 March 2014 and 17 June 2014); and (iii) the Master in Public Procurement Management (PPM) course at the University of Rome, and in conjunction with the EBRD, Department of Business Government Philosophy Studies (Rome, 10-11 April 2014)\*.

**Insolvency**

40. The Secretariat has promoted the use and adoption of insolvency texts, particularly the UNCITRAL Model Law on Cross-Border Insolvency (1997)<sup>15</sup> and the UNCITRAL Legislative Guide on Insolvency Law (2004),<sup>16</sup> through participation as a speaker at various international meetings and conferences, including:

(a) The 10th Joint UNCITRAL/INSOL/World Bank Multinational Judicial Colloquium, which aims to share information on and promotion of greater understanding of, cross-border insolvency cooperation and the key facilitating role of the Model Law on Cross-Border Insolvency. The participation of three judges was also funded (The Hague, Netherlands, 17-22 May 2013)\*;

(b) A panel “Past, present and future: European insolvency reform, UNCITRAL and beyond” organized by the IBA (Prague, 27 May 2013);

(c) Turnaround Management Association’s (TMA) Europe conference, chairing a panel on “A review of progress in European Insolvency Law” (London, 6-7 June 2013);

(d) A panel addressing cross-border insolvency, recent developments and future prospects at a conference organized by the Turnaround Management Association (TMA) (Washington, D.C., 4 October 2013);

(e) The Africa round table on insolvency law reform with the aim of facilitating discussion of insolvency law reform in the African region and identifying outcomes for further action. This event attracts participation at a high level and includes judges, government officials from both insolvency, company supervisory and other relevant ministries, insolvency professionals, bankers, and international organizations. Significant reform in some countries of the region has provided an impetus to others, as they compare themselves to best practice and international standards. As a result, we are seeing increasing enactment of the Model Law on Cross-Border Insolvency (Lusaka, 11-12 October 2013)\*;

(f) A regional judicial colloquium organized jointly by UNCITRAL/INSOL/World Bank to disseminate information on the MLCBI and its application by both judges and practitioners from the Caribbean region (Grand Cayman, 5-8 November 2013)\*;

<sup>15</sup> General Assembly resolution 52/158, annex.

<sup>16</sup> United Nations publication, Sales No. E.05.V.10.

(g) The 9th Forum on Asian Insolvency Reform (FAIR), organized jointly by The World Bank, INSOL International, UNCITRAL and the Central Bank of the Philippines (Manila, 3-5 December)\*;

(h) A symposium on Choice of Law in Cross-Border Bankruptcies, organized by the Brooklyn Journal of Corporate, Financial and Commercial Law and Brooklyn Law School, with a view to advancing possible work by UNCITRAL in this field (New York, 7 March 2014); and

(i) Day on Insolvency, organized by the Danish Maritime and Commercial Court and the Danish Organization of Insolvency Lawyers to discuss possible adoption of the Model Law on Cross-Border Insolvency by Denmark (Copenhagen, 27 March 2014).

### Security interests

41. The approach taken by the Secretariat in providing technical assistance related to UNCITRAL texts on security interests (the United Nations Convention on the Assignment of Receivables in International Trade (2001),<sup>17</sup> the UNCITRAL Legislative Guide on Secured Transactions: terminology and recommendations (2007),<sup>18</sup> its Supplement on Security Rights in Intellectual Property<sup>19</sup> and the UNCITRAL Guide on the Implementation of a Security Rights Registry (2013))<sup>20</sup> is twofold. The first approach focuses on disseminating information about those texts to Government officials, legislators, judges, academics and practitioners and thus, promoting their implementation. Such activities included participation at the following events:

(a) Consultations with officials from the Ministry of Justice and the Moscow Notary Chamber. The main purpose of the activity was to provide comments on a draft law with amendments to the law on pledge registration with a view to implementing the relevant recommendations made by UNCITRAL in its texts (Moscow, 21-24 May 2013);

(b) Academic Forum of INSOL Europe. The purpose of the activity was to present UNCITRAL's work on intellectual property financing (Paris, 25 September 2013);

(c) Consultations with officials of the Ministry of Economic Development on the proposed UNCITRAL Centre in Moscow and with the Moscow Notary Chamber with respect to amendments to the new pledge registration law, lectures on secured financing in the work of UNCITRAL at the Moscow Institute of International Relations (MGIMO) on secured financing, and a presentation on the law applicable to security interests at a Conference on the 120th anniversary of the Hague Conference (Moscow, 22-24 October 2013);

(d) Lecture on UNCITRAL's work on intellectual property financing at the University of Bristol and in the framework of the LLM Specialist Seminar Series in Financial, Corporate, and Commercial Law of the Department of Law of the London School of Economics, and lecture on the influence of the UNCITRAL Legislative Guide on Secured Transactions at the EBRD Conference on Secured Lending in Commercial Transactions: Trends and Developments (London, 30 October-6 November 2013);

(e) Lectures on international secured financing in the work of UNCITRAL in the context of the European and Asian Legal Studies LLM Programme at the University of Vienna (Vienna, 4, 11 and 18 March 2014); and

<sup>17</sup> Available from [www.uncitral.org/uncitral/en/uncitral\\_texts/security.html](http://www.uncitral.org/uncitral/en/uncitral_texts/security.html).

<sup>18</sup> Available from [www.uncitral.org/uncitral/en/uncitral\\_texts/security.html](http://www.uncitral.org/uncitral/en/uncitral_texts/security.html).

<sup>19</sup> Available from [www.uncitral.org/uncitral/en/uncitral\\_texts/security.html](http://www.uncitral.org/uncitral/en/uncitral_texts/security.html).

<sup>20</sup> Available from [www.uncitral.org/uncitral/uncitral\\_texts/security.html](http://www.uncitral.org/uncitral/uncitral_texts/security.html).



(f) Conference on secured transactions organized by the Superintendency of Companies jointly with the Banking Association with regard to the new secured transactions law and registry regulations of Colombia (Bogota, 25-28 March 2014).

42. The second approach focuses on providing technical assistance to States in their secured transactions law reform activities. An example of such activities is the technical assistance provided to the Russian Federation with respect to pledge and pledge registration law. Another example is the cooperation with international financial institutions, such as the World Bank, the International Finance Corporation (IFC), and other organizations, such as the National Law Centre on Inter-American Free Trade, in the context of their technical assistance to States. The objective of this cooperation is to ensure that technical assistance is provided consistent with UNCITRAL texts on secured transactions. Examples of such an approach include the adoption of secured transactions laws that are consistent with the UNCITRAL Legislative Guide on Secured Transactions in Colombia.

43. The Secretariat also engages in informal consultation with legislators and policymakers from various jurisdictions, in some instances as a follow-up to the aforementioned activities. Finally, the Secretariat is making progress in its work with the World Bank with a view to preparing a set of principles for effective and efficient secured transactions.

#### **Micro, Small and Medium-sized Enterprises**

44. The Secretariat has encouraged participation in and dialogue in respect of its work on micro, small and medium-sized enterprises (MSMEs — Working Group I) through its participation, at the request of the Korean Ministry of Justice, as a panellist in a discussion on MSMEs at the UNCITRAL-MOJ-KLRI Joint International Conference — Enabling Environment for Microbusiness and Creative Economy (Seoul, 14-15 October 2013).

### **III. Dissemination of information**

45. A number of publications and documents prepared by UNCITRAL serve as key resources for its technical cooperation and assistance activities, particularly with respect to dissemination of information on its work and texts.

#### **A. Website**

46. The UNCITRAL website, available in the six official languages of the United Nations, provides access to full-text UNCITRAL documentation and other materials relating to the work of UNCITRAL, such as publications, treaty status information, press releases, events and news. In line with the organizational policy for document distribution, official documents are provided, when available, via linking to the United Nations Official Document System (ODS).

47. In 2013, the website received roughly 575,000 unique visitors, an increase from 2012 (500,000 unique visitors). Approximately 58 per cent of traffic was directed to pages in English, 42 per cent to pages in Arabic, Chinese, French, Russian and Spanish. In this respect, it should be noted that, while the UNCITRAL website is among the most important electronic sources of information on international trade law in all languages, it may represent one of few available sources on this topic in some of the official languages.

48. The content of the website is updated and expanded on an ongoing basis in the framework of the activities of the UNCITRAL Law Library and therefore at no additional cost to the Secretariat. In particular, UNCITRAL official documents relating to earlier Commission sessions are continuously uploaded in the ODS and made available on the website under a project on digitization of UNCITRAL archives conducted jointly with the UNOV Documents Management Unit.

## B. Library

49. Since its establishment in 1979, the UNCITRAL Law Library has been serving research needs of Secretariat staff and participants in intergovernmental meetings convened by UNCITRAL. It has also provided research assistance to staff of Permanent Missions, global staff of the United Nations, staff of other Vienna-based international organizations, external researchers and law students. In 2013, library staff responded to approximately 550 reference requests, a 16 per cent increase over 2012, originating from over 52 countries.

50. The collection of the UNCITRAL Law Library focuses primarily on international trade law and currently holds over 10,000 monographs, 100 active journal titles, legal and general reference material, including non-UNCITRAL United Nations documents, documents of other international organizations; and electronic resources (restricted to in-house use only). Particular attention is given to expanding the holdings in all of the six United Nations official languages. While use of electronic resources has increased, resources on trade law from many countries are still only found in print, and circulation of print items has remained steady.

51. The UNCITRAL Law Library maintains an online public access catalogue (OPAC) jointly with the other United Nations libraries in Vienna and with the technical support of the United Nations Library in Geneva. The OPAC is available via the library page of the UNCITRAL website.

52. The UNCITRAL Law Library staff prepares for the Commission an annual "Bibliography of recent writings related to the work of UNCITRAL". The bibliography includes references to books, articles and dissertations in a variety of languages, classified according to subject (for the forty-seventh Commission session, see A/CN.9/805). Individual records of the bibliography are entered into the OPAC, and the full-text collection of all cited materials is maintained in the Library collection. Monthly updates from the date of the latest annual bibliography are available in the bibliography section of the UNCITRAL website.

53. The Library produces a consolidated bibliography of writings related to the work of UNCITRAL on the UNCITRAL website.<sup>21</sup> The consolidated bibliography aims to compile all entries of the bibliographical reports submitted to the Commission since 1968. It currently contains over 7,000 entries, reproduced in the English and the original language versions, verified and standardized to the extent possible.

## C. Publications

54. In addition to official documents, UNCITRAL traditionally maintains two series of publications, namely the texts of all instruments developed by the Commission and the UNCITRAL Yearbook. Publications are regularly provided in support of technical cooperation and assistance activities undertaken by the Secretariat, as well as by other organizations where the work of UNCITRAL is discussed, and in the context of national law reform efforts.

55. The following works were published in 2013: A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law,<sup>22</sup> Recognizing and Preventing Commercial Fraud: Indicators of Commercial Fraud,<sup>23</sup> Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules (as revised in 2010),<sup>24</sup> UNCITRAL Legislative Guide on Insolvency Law, Part Four: Directors' obligations in the period approaching insolvency,<sup>25</sup> and the 2010 UNCITRAL Yearbook.<sup>26</sup>

<sup>21</sup> Available from [www.uncitral.org/uncitral/publications/bibliography\\_consolidated.html](http://www.uncitral.org/uncitral/publications/bibliography_consolidated.html).

<sup>22</sup> Available from [www.uncitral.org/uncitral/en/about\\_us.html](http://www.uncitral.org/uncitral/en/about_us.html).

<sup>23</sup> Available from [www.uncitral.org/uncitral/en/uncitral\\_texts/payments.html](http://www.uncitral.org/uncitral/en/uncitral_texts/payments.html).

<sup>24</sup> Available from [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html).

<sup>25</sup> Available from [www.uncitral.org/uncitral/uncitral\\_texts/insolvency.html](http://www.uncitral.org/uncitral/uncitral_texts/insolvency.html).

<sup>26</sup> Available from [www.uncitral.org/uncitral/publications/yearbook.html](http://www.uncitral.org/uncitral/publications/yearbook.html).

56. The following works were published in early 2014: UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013),<sup>27</sup> UNCITRAL Guide on the Implementation of a Security Rights Registry, UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (Updated 2013),<sup>28</sup> UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation,<sup>29</sup> UNCITRAL Model Law on Public Procurement, and UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

57. In light of budget and environmental concerns, the Secretariat has continued its efforts to use electronic media as a primary method to disseminate UNCITRAL texts. Thus, print runs for all publications have been reduced and several texts published in 2013 and so far in 2014 have been published exclusively in electronic format, namely: Recognizing and Preventing Commercial Fraud: Indicators of Commercial Fraud (e-book), UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (Updated 2013) (e-book), and the 2010 UNCITRAL *Yearbook* (CD-ROM and e-book).

#### **D. Press releases**

58. Press releases are being regularly issued when treaty actions relating to UNCITRAL texts take place or information is received on the adoption of an UNCITRAL model law or other relevant text. Press releases are also issued with respect to information of particular importance and direct relevance to UNCITRAL. Those press releases are provided to interested parties by e-mail and are posted on the UNCITRAL website, as well as on the website of the United Nations Information Service (UNIS) in Vienna or of the Department of Public Information, News and Media Division in New York, if applicable.

59. To improve the accuracy and timeliness of information received with respect to the adoption of UNCITRAL model laws, since such adoption does not require a formal action with the United Nations Secretariat, and to facilitate the dissemination of related information, the Commission may wish to request Member States to advise the Secretariat when enacting legislation implementing an UNCITRAL model law.

#### **E. General enquiries**

60. The Secretariat currently addresses approximately 2,000 general enquiries per year concerning, inter alia, technical aspects and availability of UNCITRAL texts, working papers, Commission documents and related matters. Increasingly, these enquiries are answered by reference to the UNCITRAL website.

#### **F. Briefings for Permanent Missions in Vienna**

61. The Secretariat provided an Information meeting in preparation for the UNCITRAL 46th session of the Commission held in Vienna on 2 July 2013 and a briefing on Relevance of UNCITRAL to the 8th session of the General Assembly Open Working Group on Sustainable Development Goals (the OWG) on 20 January 2014 in New York.

#### **G. Information lectures in Vienna**

62. The Secretariat provides upon request information lectures in-house on the work of UNCITRAL to visiting university students and academics, members of the bar, Government officials including judges and others interested. Since the last report,

<sup>27</sup> Available from [www.uncitral.org/uncitral/en/case\\_law/digests.html](http://www.uncitral.org/uncitral/en/case_law/digests.html).

<sup>28</sup> Available from [www.uncitral.org/uncitral/en/case\\_law/digests.html](http://www.uncitral.org/uncitral/en/case_law/digests.html).

<sup>29</sup> Available from [www.uncitral.org/uncitral/en/case\\_law/digests.html](http://www.uncitral.org/uncitral/en/case_law/digests.html).

lectures have been given to visitors from, inter alia, Austria, Germany, Slovenia and visiting delegations from Latin America and Vis Moot.

## **IV. Resources and funding**

63. The costs of most technical cooperation and assistance activities are not covered by the regular budget. The ability of the Secretariat to implement the technical cooperation and assistance component of the UNCITRAL work programme is therefore contingent upon the availability of extrabudgetary funding.

64. The Secretariat has explored a variety of ways to increase resources for technical assistance activities, including through in-kind contributions. In particular, a number of missions have been funded, in full or in part, by the organizers. Additional potential sources of funding could be available if trade law reform activities could be mainstreamed more regularly in broader international development assistance programmes. In this respect, the Commission may wish to provide guidance on possible future steps.

### **A. UNCITRAL Trust Fund for symposia**

65. The UNCITRAL Trust Fund for symposia supports technical cooperation and assistance activities for the members of the legal community in developing countries, funding the participation of UNCITRAL staff or other experts at seminars where UNCITRAL texts are presented for examination and possible adoption and fact-finding missions for law reform assessments in order to review existing domestic legislation and assess country needs for law reform in the commercial field.

66. During the period under review, the Government of the Republic of Korea, through its Ministry of Justice provided a contribution of US\$ 18,803 for the participation of the UNCITRAL Secretariat in the APEC EoDB project during 2013 (see para. 12 above). In addition, a new contribution of US\$ 20,000 was received for 2013 and a new pledge of US\$ 20,000 for 2014 has been made by the Government of Indonesia, both to whom the Commission may wish to express its appreciation.

67. At its 46th Session (Vienna, 8-26 July 2013), the Commission appealed to all States, international organizations and other interested entities to consider making contributions to the Trust Fund for UNCITRAL symposia, if possible, in the form of multi-year contributions, or as specific-purpose contributions, so as to facilitate planning and enable the Secretariat to meet the increasing requests from developing countries and countries with economies in transition for training and technical legislative assistance (A/68/17, paras. 232-234). Potential donors have also been approached on an individual basis.

68. The Commission may wish to note that, in spite of efforts by the Secretariat to solicit new donations, funds available in the Trust Fund are sufficient only for a very small number of future technical cooperation and assistance activities. Efforts to organize the requested activities at the lowest cost and with co-funding and cost sharing whenever possible are ongoing. However, once current funds are exhausted, requests for technical cooperation and assistance involving the expenditure of funds for travel or to meet other costs will have to be declined unless new donations to the Trust Fund are received or alternative sources of funds can be found.

69. The Commission may once again wish to appeal to all States, relevant United Nations Agencies and bodies, international organizations and other interested entities to make contributions to the Trust Fund, if possible in the form of multi-year contributions, so as to facilitate planning and to enable the Secretariat to meet the demand for technical cooperation and assistance activities and to develop a more sustained and sustainable technical assistance programme. The Commission may also wish to request Member States to assist the Secretariat in identifying sources of funding within their Governments.

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**B. UNCITRAL Trust Fund to grant travel assistance to developing countries that are members of UNCITRAL**

70. The Commission may wish to recall that, in accordance with General Assembly resolution 48/32 of 9 December 1993, the Secretary-General was requested to establish a Trust Fund to grant travel assistance to developing countries that are members of UNCITRAL. The Trust Fund so established is open to voluntary financial contributions from States, intergovernmental organizations, regional economic integration organizations, national institutions and non-governmental organizations, as well as to natural and juridical persons.

71. In the period under review, a contribution in the amount of euro 5,000 has been made by the Government of Austria, to whom the Commission may wish to express its appreciation.

72. During 2013, the available Trust Fund resources were used to facilitate participation at the 46th session of UNCITRAL in Vienna in July 2013 for delegates from El Salvador, Honduras and Mexico. Due to the limited resources, cost coverage has been provided either for the air ticket, or for the DSA only.

73. In order to ensure participation of all Member States in the sessions of UNCITRAL and its Working Groups, the Commission may wish to reiterate its appeal to relevant bodies in the United Nations system, organizations, institutions and individuals to make voluntary contributions to the Trust Fund established to provide travel assistance to developing countries that are members of the Commission.

74. It is recalled that in its resolution 51/161 of 16 December 1996, the General Assembly decided to include the Trust Funds for UNCITRAL symposia and travel assistance in the list of funds and programmes that are dealt with at the United Nations Pledging Conference for Development Activities.



## X. STATUS AND PROMOTION OF UNCITRAL LEGAL TEXTS

### Note by the Secretariat on the status of conventions and model laws

(A/CN.9/806)

[Original: English]

1. At its thirteenth session, in 1980, the United Nations Commission on International Trade Law (UNCITRAL) decided<sup>1</sup> that it would consider, at each of its sessions, the status of conventions that were the outcome of work carried out by it.

2. The present note sets forth the status of the conventions and model laws emanating from the work of the Commission. It also shows the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958),<sup>2</sup> which, although adopted prior to the establishment of the Commission, is closely related to the work of the Commission in the area of international commercial arbitration.

3. Technical cooperation and assistance activities aimed at promoting the use and adoption of its texts are priorities for UNCITRAL pursuant to a decision taken at its twentieth session (1987).<sup>3</sup> The Secretariat monitors adoption of model laws and conventions.

4. This note indicates the changes since 30 April 2013, when the last annual report in this series (A/CN.9/773) was issued. The information contained herein is current up to 2 May 2014. Information on the status of conventions and model laws is regularly updated on the UNCITRAL website ([www.uncitral.org](http://www.uncitral.org)) and is made available as detailed tables related to specific texts and as a single table providing an overview of all texts. Authoritative information on the status of the treaties deposited with the Secretary-General of the United Nations, including historical status information, may be obtained by consulting the United Nations Treaty Collection (<http://treaties.un.org>). Readers may also wish to contact the Treaty Section of the Office of Legal Affairs of the United Nations (tel.: (+1-212) 963-5047; fax: (+1-212) 963-3693; e-mail: [treaty@un.org](mailto:treaty@un.org)).

5. This note covers the following texts, incorporating as indicated new treaty actions (the term “action” is used generically to denote the deposit of an instrument of ratification, approval, acceptance or accession in respect of a treaty, or participation in a treaty as a result of an action to a related treaty, or the withdrawal or modification of a declaration or of a reservation) and enactments of Model Laws based on information received since the last report:

(a) In the area of sale of goods:

Convention on the Limitation Period in the International Sale of Goods, (New York, 1974),<sup>4</sup> as amended by the Protocol of 11 April 1980 (Vienna)<sup>5</sup> (as amended: 22 States parties; unamended: 29 States parties);

United Nations Convention on Contracts for the International Sale of Goods, (Vienna, 1980).<sup>6</sup> New actions by Bahrain (accession); Lithuania (withdrawal of declaration); and Norway (withdrawal of declaration); 80 States parties;

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<sup>1</sup> *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17)*, para. 163.

<sup>2</sup> United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3.

<sup>3</sup> *Official Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17)*, para. 335.

<sup>4</sup> United Nations, *Treaty Series*, vol. 1511, No. 26119, p. 3. For the complete status of this text, see part I, sect. A.

<sup>5</sup> United Nations, *Treaty Series*, vol. 1511, No. 26121, p. 99. For the complete status of this text, see part I, sect. A.

<sup>6</sup> United Nations, *Treaty Series*, vol. 1489, No. 25567, p. 3. For the complete status of this text, see part I, sect. C.

## (b) In the area of dispute resolution:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (New York, 1958).<sup>7</sup> New actions by Mauritius (withdrawal of declaration); and United Kingdom of Great Britain and Northern Ireland (extension of territorial application); 149 States parties;

UNCITRAL Model Law on International Commercial Arbitration (1985),<sup>8</sup> with amendments as adopted in 2006.<sup>9</sup> New legislation based on the Model Law as amended in 2006 has been adopted in Belgium (2013); and Lithuania (2012);

UNCITRAL Model Law on International Commercial Conciliation (2002).<sup>10</sup> New legislation based on the Model Law has been adopted in Belgium (2005); France (2011); Luxembourg (2012); Switzerland (2008); and the United States of America, in Hawaii (2013);

## (c) In the area of government contracting:

UNCITRAL Model Law on Public Procurement (2011);<sup>11</sup>

## (d) In the area of banking and payments:

United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988)<sup>12</sup> (5 States parties);

UNCITRAL Model Law on International Credit Transfers (1992);<sup>13</sup>

United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995)<sup>14</sup> (8 States parties);

## (e) In the area of security interests:

United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001)<sup>15</sup> (1 State party);

## (f) In the area of insolvency:

UNCITRAL Model Law on Cross-Border Insolvency (1997).<sup>16</sup> New legislation based on the Model Law has been adopted in Chile (2014);

## (g) In the area of transport:

United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978)<sup>17</sup> (34 States parties);

<sup>7</sup> United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3. For the complete status of this text, see part I, sect. J.

<sup>8</sup> *Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, annex I. For the complete status of this text, see part II, sect. A.

<sup>9</sup> United Nations publication, Sales No. E.08.V.4. For the complete status of this text, see part II, sect. A.

<sup>10</sup> *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17)*, annex I. For the complete status of this text, see part II, sect. F.

<sup>11</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, annex I. For the complete status of this text, see part II, sect. G.

<sup>12</sup> General Assembly resolution 43/165, annex. The Convention has not yet entered into force; it requires ten States parties for entry into force. For the complete status of this text, see part I, sect. D.

<sup>13</sup> *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17 (A/47/17)*, annex I. For the complete status of this text, see part II, sect. B.

<sup>14</sup> United Nations, *Treaty Series*, vol. 2169, No. 38030, p. 163. For the complete status of this text, see part I, sect. F.

<sup>15</sup> General Assembly resolution 56/81, annex. The Convention has not yet entered into force; it requires five States parties for entry into force. For the complete status of this text, see part I, sect. G.

<sup>16</sup> General Assembly resolution 52/158, annex. For the complete status of this text, see part II, sect. D.

<sup>17</sup> United Nations, *Treaty Series*, vol. 1695, No. 29215, p. 3. For the complete status of this text, see part I, sect. B.



United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991)<sup>18</sup> (4 States parties);

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008).<sup>19</sup> New action by Congo (ratification). New signature by Guinea-Bissau; 3 States parties;

(h) In the area of electronic commerce:

UNCITRAL Model Law on Electronic Commerce (1996).<sup>20</sup> New legislation based on the Model Law has been adopted in Antigua and Barbuda (2006); Australia, in Queensland (2013); Bangladesh (2006); Liberia (2002); Gambia (2009); Grenada (2008); Oman (2008); Saint Kitts and Nevis (2011); San Marino (2013); Seychelles (2001); Syrian Arab Republic (2014); and the United States of America, in Georgia (2009);

UNCITRAL Model Law on Electronic Signatures (2001).<sup>21</sup> New legislation based on the Model Law has been adopted in Antigua and Barbuda (2006); Gambia (2009); Grenada (2008); Honduras (2013); Oman (2008); Saint Kitts and Nevis (2011); and San Marino (2013);

United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005).<sup>22</sup> New actions by Congo (accession); and the Russian Federation (acceptance); 5 States parties.

6. Previous annual reports in this series also included chronological tables of actions for conventions. To avoid redundancy, this information can now be found on the UNCITRAL website.

7. UNCITRAL texts also include legislative and legal guides and contractual standards whose impact cannot be assessed by reference to their adoption by States.<sup>23</sup> Nonetheless, the Secretariat has been advised on occasion of instances in which these texts have been used in law reform efforts. For example, in February 2014, Colombia adopted a decree<sup>24</sup> which faithfully implements the recommendations of the UNCITRAL Guide on the Implementation of a Security Rights Registry (2013).<sup>25</sup>

<sup>18</sup> *Official Records of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade, Vienna, 2-19 April 1991* (United Nations publication, Sales No. E.93.XI.3), part I, annex. The Convention has not yet entered into force; it requires five States parties for entry into force. For the complete status of this text, see part I, sect. E.

<sup>19</sup> General Assembly resolution 63/122, annex. The Convention has not yet entered into force; it requires 20 States parties for entry into force. For the complete status of this text, see part I, sect. I.

<sup>20</sup> United Nations publication, Sales No. E.99.V.4. For the complete status of this text, see part II, sect. C.

<sup>21</sup> General Assembly resolution 56/80, annex. For the complete status of this text, see part II, sect. E.

<sup>22</sup> General Assembly resolution 60/21, annex. For the complete status of this text, see part I, sect. H.

<sup>23</sup> All UNCITRAL texts are available in the six official languages of the United Nations on the UNCITRAL website, [www.uncitral.org](http://www.uncitral.org).

<sup>24</sup> Decreto 400 de 2014, available, for example, from [www.icbf.gov.co/cargues/avance/docs/decreto\\_0400\\_2014.htm](http://www.icbf.gov.co/cargues/avance/docs/decreto_0400_2014.htm).

<sup>25</sup> Available from [www.uncitral.org/uncitral/uncitral\\_texts/security.html](http://www.uncitral.org/uncitral/uncitral_texts/security.html).

## I. Participation in conventions

### A. Convention on the Limitation Period in the International Sale of Goods (New York, 1974), as amended by the Protocol of 11 April 1980 (Vienna)

<i>State</i>	<i>Signature</i>	<i>Ratification, accession<sup>(*)</sup>, succession<sup>(§)</sup> or participation under Article VIII or X of the Protocol of 11 April 1980<sup>(†)</sup></i>	<i>Entry into force</i>
Argentina		19 July 1983 <sup>(*)</sup>	1 August 1988
Belarus	14 June 1974	23 January 1997 <sup>(*)</sup>	1 August 1997
Belgium		1 August 2008 <sup>(*)</sup>	1 March 2009
Benin <sup>a</sup>		29 July 2011 <sup>(*)</sup>	1 February 2012
Bosnia and Herzegovina <sup>a</sup>		12 January 1994 <sup>(§)</sup>	6 March 1992
Brazil	14 June 1974		
Bulgaria	24 February 1975		
Burundi <sup>a</sup>		4 September 1998 <sup>(*)</sup>	1 April 1999
Costa Rica	30 August 1974		
Cuba		2 November 1994 <sup>(*)</sup>	1 June 1995
Czech Republic <sup>b</sup>		30 September 1993 <sup>(§)</sup>	1 January 1993
Dominican Republic <sup>d</sup>		30 July 2010 <sup>(*)</sup>	1 February 2011
Egypt		6 December 1982 <sup>(*)</sup>	1 August 1988
Ghana <sup>a</sup>	5 December 1974	7 October 1975	1 August 1988
Guinea		23 January 1991 <sup>(*)</sup>	1 August 1991
Hungary	14 June 1974	16 June 1983 <sup>(*)</sup>	1 August 1988
Liberia		16 September 2005 <sup>(†)</sup>	1 April 2006
Mexico		21 January 1988 <sup>(*)</sup>	1 August 1988
Mongolia	14 June 1974		
Montenegro <sup>c</sup>		6 August 2012 <sup>(*)</sup>	1 March 2013
Nicaragua	13 May 1975		
Norway <sup>a,c</sup>	11 December 1975	20 March 1980	1 August 1988
Paraguay		18 August 2003 <sup>(*)</sup>	1 March 2004
Poland	14 June 1974	19 May 1995 <sup>(†)</sup>	1 December 1995
Republic of Moldova		28 August 1997 <sup>(*)</sup>	1 March 1998
Romania		23 April 1992 <sup>(†)</sup>	1 November 1992
Russian Federation	14 June 1974		
Serbia <sup>a</sup>		12 March 2001 <sup>(§)</sup>	27 April 1992
Slovakia <sup>b</sup>		28 May 1993 <sup>(§)</sup>	1 January 1993
Slovenia		2 August 1995 <sup>(†)</sup>	1 March 1996
Uganda		12 February 1992 <sup>(†)</sup>	1 September 1992
Ukraine <sup>a</sup>	14 June 1974	13 September 1993	1 April 1994
United States of America <sup>b</sup>		5 May 1994 <sup>(†)</sup>	1 December 1994
Uruguay		1 April 1997 <sup>(†)</sup>	1 November 1997
Zambia		6 June 1986 <sup>(*)</sup>	1 August 1988

**Parties (as amended by the Protocol of 1980): 22**  
**Parties (unamended): 29**

For information on which States listed above are Parties to the 1980 amending Protocol, consult the United Nations Treaty Collection, <http://treaties.un.org>.

<sup>a</sup> Party only to the unamended Convention.

<sup>b</sup> Upon accession to the Protocol, Czechoslovakia and the United States of America declared that, pursuant to article XII of the Protocol, they did not consider themselves bound by article I of the Protocol.

<sup>c</sup> Upon signature, Norway declared, and confirmed upon ratification, that, in accordance with article 34, the Convention would not govern contracts of sale where the seller and the buyer both had their relevant places of business within the territories of the Nordic States (i.e. Denmark, Finland, Iceland, Norway and Sweden).

<sup>d</sup> From 1 August 1988 to 31 January 2011, the Dominican Republic was a Party to the unamended Convention.

<sup>c</sup> From 3 June 2006 to 28 February 2013, Montenegro was a Party to the unamended Convention.

## B. United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978)

<i>State</i>	<i>Signature</i>	<i>Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)</i>	<i>Entry into force</i>
Albania		20 July 2006 <sup>(*)</sup>	1 August 2007
Austria	30 April 1979	29 July 1993	1 August 1994
Barbados		2 February 1981 <sup>(*)</sup>	1 November 1992
Botswana		16 February 1988 <sup>(*)</sup>	1 November 1992
Brazil	31 March 1978		
Burkina Faso		14 August 1989 <sup>(*)</sup>	1 November 1992
Burundi		4 September 1998 <sup>(*)</sup>	1 October 1999
Cameroon		21 October 1993 <sup>(*)</sup>	1 November 1994
Chile	31 March 1978	9 July 1982	1 November 1992
Czech Republic <sup>a</sup>	2 June 1993	23 June 1995	1 July 1996
Democratic Republic of the Congo	19 April 1979		
Denmark	18 April 1979		
Dominican Republic		28 September 2007 <sup>(*)</sup>	1 October 2008
Ecuador	31 March 1978		
Egypt	31 March 1978	23 April 1979	1 November 1992
Finland	18 April 1979		
France	18 April 1979		
Gambia		7 February 1996 <sup>(*)</sup>	1 March 1997
Georgia		21 March 1996 <sup>(*)</sup>	1 April 1997
Germany	31 March 1978		
Ghana	31 March 1978		
Guinea		23 January 1991 <sup>(*)</sup>	1 November 1992
Holy See	31 March 1978		
Hungary	23 April 1979	5 July 1984	1 November 1992
Jordan		10 May 2001 <sup>(*)</sup>	1 June 2002
Kazakhstan		18 June 2008 <sup>(*)</sup>	1 July 2009
Kenya		31 July 1989 <sup>(*)</sup>	1 November 1992
Lebanon		4 April 1983 <sup>(*)</sup>	1 November 1992
Lesotho		26 October 1989 <sup>(*)</sup>	1 November 1992
Liberia		16 September 2005 <sup>(*)</sup>	1 October 2006
Madagascar	31 March 1978		
Malawi		18 March 1991 <sup>(*)</sup>	1 November 1992
Mexico	31 March 1978		
Morocco		12 June 1981 <sup>(*)</sup>	1 November 1992
Nigeria		7 November 1988 <sup>(*)</sup>	1 November 1992
Norway	18 April 1979		
Pakistan	8 March 1979		
Panama	31 March 1978		
Paraguay		19 July 2005 <sup>(*)</sup>	1 August 2006
Philippines	14 June 1978		
Portugal	31 March 1978		
Romania		7 January 1982 <sup>(*)</sup>	1 November 1992
Saint Vincent and the Grenadines		12 September 2000 <sup>(*)</sup>	1 October 2001

<i>State</i>	<i>Signature</i>	<i>Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)</i>	<i>Entry into force</i>
Senegal	31 March 1978	17 March 1986	1 November 1992
Sierra Leone	15 August 1978	7 October 1988	1 November 1992
Singapore	31 March 1978		
Slovakia	28 May 1993		
Sweden	18 April 1979		
Syrian Arab Republic		16 October 2002 <sup>(*)</sup>	1 November 2003
Tunisia		15 September 1980 <sup>(*)</sup>	1 November 1992
Uganda		6 July 1979 <sup>(*)</sup>	1 November 1992
United Republic of Tanzania		24 July 1979 <sup>(*)</sup>	1 November 1992
United States of America	30 April 1979		
Venezuela (Bolivarian Republic of)	31 March 1978		
Zambia		7 October 1991 <sup>(*)</sup>	1 November 1992

### Parties: 34

<sup>a</sup> The Czech Republic declared that limits of carrier's liability in the territory of the Czech Republic adhered to the provision of article 6 of the Convention.

## C. United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)

<i>State</i>	<i>Signature</i>	<i>Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)</i>	<i>Entry into force</i>
Albania		13 May 2009 <sup>(*)</sup>	1 June 2010
Argentina <sup>a</sup>		19 July 1983 <sup>(*)</sup>	1 January 1988
Armenia <sup>a,b</sup>		2 December 2008 <sup>(*)</sup>	1 January 2010
Australia		17 March 1988 <sup>(*)</sup>	1 April 1989
Austria	11 April 1980	29 December 1987	1 January 1989
Bahrain		25 September 2013	1 October 2014
Belarus <sup>a</sup>		9 October 1989 <sup>(*)</sup>	1 November 1990
Belgium		31 October 1996 <sup>(*)</sup>	1 November 1997
Benin		29 July 2011 <sup>(*)</sup>	1 August 2012
Bosnia and Herzegovina		12 January 1994(§)	6 March 1992
Brazil		4 March 2013 <sup>(*)</sup>	1 April 2014
Bulgaria		9 July 1990 <sup>(*)</sup>	1 August 1991
Burundi		4 September 1998 <sup>(*)</sup>	1 October 1999
Canada <sup>c</sup>		23 April 1991 <sup>(*)</sup>	1 May 1992
Chile <sup>a</sup>	11 April 1980	7 February 1990	1 March 1991
China <sup>a,b</sup>	30 September 1981	11 December 1986(†)	1 January 1988
Colombia		10 July 2001 <sup>(*)</sup>	1 August 2002
Croatia		8 June 1998(§)	8 October 1991
Cuba		2 November 1994 <sup>(*)</sup>	1 December 1995
Cyprus		7 March 2005 <sup>(*)</sup>	1 April 2006
Czech Republic <sup>b</sup>		30 September 1993(§)	1 January 1993
Denmark <sup>d</sup>	26 May 1981	14 February 1989	1 March 1990
Dominican Republic		7 June 2010 <sup>(*)</sup>	1 July 2011
Ecuador		27 January 1992 <sup>(*)</sup>	1 February 1993
Egypt		6 December 1982 <sup>(*)</sup>	1 January 1988
El Salvador		27 November 2006 <sup>(*)</sup>	1 December 2007
Estonia		20 September 1993 <sup>(*)</sup>	1 October 1994
Finland <sup>d</sup>	26 May 1981	15 December 1987	1 January 1989

<i>State</i>	<i>Signature</i>	<i>Ratification, Accession(*) Approval(†), Acceptance(‡) or Succession(§)</i>	<i>Entry into force</i>
France	27 August 1981	6 August 1982(†)	1 January 1988
Gabon		15 December 2004(*)	1 January 2006
Georgia		16 August 1994(*)	1 September 1995
Germany <sup>e</sup>	26 May 1981	21 December 1989	1 January 1991
Ghana	11 April 1980		
Greece		12 January 1998(*)	1 February 1999
Guinea		23 January 1991(*)	1 February 1992
Honduras		10 October 2002(*)	1 November 2003
Hungary <sup>a,f</sup>	11 April 1980	16 June 1983	1 January 1988
Iceland <sup>d</sup>		10 May 2001(*)	1 June 2002
Iraq		5 March 1990(*)	1 April 1991
Israel		22 January 2002(*)	1 February 2003
Italy	30 September 1981	11 December 1986	1 January 1988
Japan		1 July 2008(*)	1 August 2009
Kyrgyzstan		11 May 1999(*)	1 June 2000
Latvia <sup>a</sup>		31 July 1997(*)	1 August 1998
Lebanon		21 November 2008(*)	1 December 2009
Lesotho	18 June 1981	18 June 1981	1 January 1988
Liberia		16 September 2005(*)	1 October 2006
Lithuania <sup>a</sup>		18 January 1995(*)	1 February 1996
Luxembourg		30 January 1997(*)	1 February 1998
Mauritania		20 August 1999(*)	1 September 2000
Mexico		29 December 1987(*)	1 January 1989
Mongolia		31 December 1997(*)	1 January 1999
Montenegro		23 October 2006(§)	3 June 2006
Netherlands	29 May 1981	13 December 1990(‡)	1 January 1992
New Zealand		22 September 1994(*)	1 October 1995
Norway <sup>d</sup>	26 May 1981	20 July 1988	1 August 1989
Paraguay <sup>a</sup>		13 January 2006(*)	1 February 2007
Peru		25 March 1999(*)	1 April 2000
Poland	28 September 1981	19 May 1995	1 June 1996
Republic of Korea		17 February 2004(*)	1 March 2005
Republic of Moldova		13 October 1994(*)	1 November 1995
Romania		22 May 1991(*)	1 June 1992
Russian Federation <sup>a</sup>		16 August 1990(*)	1 September 1991
Saint Vincent and the Grenadines <sup>b</sup>		12 September 2000(*)	1 October 2001
San Marino		22 February 2012(*)	1 March 2013
Serbia		12 March 2001(§)	27 April 1992
Singapore <sup>b</sup>	11 April 1980	16 February 1995	1 March 1996
Slovakia <sup>b</sup>		28 May 1993(§)	1 January 1993
Slovenia		7 January 1994(§)	25 June 1991
Spain		24 July 1990(*)	1 August 1991
Sweden <sup>d</sup>	26 May 1981	15 December 1987	1 January 1989
Switzerland		21 February 1990(*)	1 March 1991
Syrian Arab Republic		19 October 1982(*)	1 January 1988
The former Yugoslav Republic of Macedonia		22 November 2006(§)	17 November 1991
Turkey		7 July 2010(*)	1 August 2011
Uganda		12 February 1992(*)	1 March 1993
Ukraine <sup>a</sup>		3 January 1990(*)	1 February 1991
United States of America <sup>b</sup>	31 August 1981	11 December 1986	1 January 1988
Uruguay		25 January 1999(*)	1 February 2000
Uzbekistan		27 November 1996(*)	1 December 1997

<i>State</i>	<i>Signature</i>	<i>Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)</i>	<i>Entry into force</i>
Venezuela (Bolivarian Republic of)	28 September 1981		
Zambia		6 June 1986(*)	1 January 1988

#### Parties: 80

<sup>a</sup> This State declared, in accordance with articles 12 and 96 of the Convention, that any provision of article 11, article 29 or Part II of the Convention that allowed a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing, would not apply where any party had his place of business in its territory.

<sup>b</sup> This State declared that it would not be bound by paragraph 1 (b) of article 1.

<sup>c</sup> Upon accession, Canada declared that, in accordance with article 93 of the Convention, the Convention would extend to Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island and the Northwest Territories. In a declaration received on 9 April 1992, Canada extended the application of the Convention to Quebec and Saskatchewan. In a notification received on 29 June 1992, Canada extended the application of the Convention to the Yukon Territory. In a notification received on 18 June 2003, Canada extended the application of the Convention to the Territory of Nunavut.

<sup>d</sup> Norway declared that it would not be bound by Part II of the Convention (“Formation of the Contract”). Denmark, Finland, Iceland, Norway and Sweden declared that the Convention would not apply to contracts of sale or to their formation where the parties have their places of business in Denmark, Finland, Iceland, Norway or Sweden.

<sup>e</sup> Upon ratifying the Convention, Germany declared that it would not apply article 1, paragraph 1 (b) in respect of any State that had made a declaration that that State would not apply article 1, paragraph 1 (b).

<sup>f</sup> Upon ratifying the Convention, Hungary declared that it considered the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance to be subject to the provisions of article 90 of the Convention.

### D. United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988)

<i>State</i>	<i>Signature</i>	<i>Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)</i>
Canada	7 December 1989	
Gabon		15 December 2004(*)
Guinea		23 January 1991(*)
Honduras		8 August 2001(*)
Liberia		16 September 2005(*)
Mexico		11 September 1992(*)
Russian Federation	30 June 1990	
United States of America	29 June 1990	

#### Parties: 5

### E. United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991)

<i>State</i>	<i>Signature</i>	<i>Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)</i>
Egypt		6 April 1999(*)
France	15 October 1991	
Gabon		15 December 2004(*)
Georgia		21 March 1996(*)
Mexico	19 April 1991	
Paraguay		19 July 2005(*)

<i>State</i>	<i>Signature</i>	<i>Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)</i>
Philippines	19 April 1991	
Spain	19 April 1991	
United States of America	30 April 1992	

**Parties: 4****F. United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995)**

<i>State</i>	<i>Signature</i>	<i>Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)</i>	<i>Entry into force</i>
Belarus	3 December 1996	23 January 2002	1 February 2003
Ecuador		18 June 1997 <sup>(*)</sup>	1 January 2000
El Salvador	5 September 1997	31 July 1998	1 January 2000
Gabon		15 December 2004 <sup>(*)</sup>	1 January 2006
Kuwait		28 October 1998 <sup>(*)</sup>	1 January 2000
Liberia		16 September 2005 <sup>(*)</sup>	1 October 2006
Panama	9 July 1997	21 May 1998	1 January 2000
Tunisia		8 December 1998 <sup>(*)</sup>	1 January 2000
United States of America	11 December 1997		

**Parties: 8****G. United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001)**

<i>State</i>	<i>Signature</i>	<i>Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)</i>
Liberia		16 September 2005 <sup>(*)</sup>
Luxembourg <sup>a</sup>	12 June 2002	
Madagascar	24 September 2003	
United States of America	30 December 2003	

**Party: 1**

It should be noted that the principles of the Convention were incorporated into the UNCITRAL Legislative Guide on Secured Transactions (2007).<sup>26</sup> Thus, States that substantially implement the recommendations of the Guide have, at the same time, introduced the principles of the Convention into their domestic law.

<sup>a</sup> Upon signature, Luxembourg lodged the following declaration:

“Pursuant to article 39 of the Convention, the Grand Duchy of Luxembourg declares that it does not wish to be bound by chapter V, which contains autonomous conflict-of-laws rules that allow too wide an application to laws other than those of the assignor and that moreover are difficult to reconcile with the Rome Convention. The Grand Duchy of Luxembourg, pursuant to article 42, paragraph 1 (c), of the Convention, will be bound by the priority rules set forth in section III of the annex, namely those based on the time of the contract of assignment.”

<sup>26</sup> United Nations publication, Sales No. E.09.V.12.

## H. United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)

<i>State</i>	<i>Signature</i>	<i>Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)</i>	<i>Entry into force</i>
Central African Republic	27 February 2006		
China	6 July 2006		
Colombia	27 September 2007		
Congo		28 January 2014 <sup>(*)</sup>	1 August 2014
Dominican Republic		2 August 2012 <sup>(*)</sup>	1 March 2013
Honduras	16 January 2008	15 June 2010	1 March 2013
Iran (Islamic Republic of)	26 September 2007		
Lebanon	22 May 2006		
Madagascar	19 September 2006		
Montenegro	27 September 2007		
Panama	25 September 2007		
Paraguay	26 March 2007		
Philippines	25 September 2007		
Republic of Korea	15 January 2008		
Russian Federation <sup>b</sup>	25 April 2007	6 January 2014 <sup>(‡)</sup>	1 August 2014
Saudi Arabia	12 November 2007		
Senegal	7 April 2006		
Sierra Leone	21 September 2006		
Singapore <sup>a</sup>	6 July 2006	7 July 2010	1 March 2013
Sri Lanka	6 July 2006		

### Parties: 5

Information on jurisdictions enacting at the national level substantive provisions of the Convention is included in the status information for the UNCITRAL Model Law on Electronic Commerce (1996) (see part II, sect. C).

<sup>a</sup> Upon ratification, Singapore declared: The Convention shall not apply to electronic communications relating to any contract for the sale or other disposition of immovable property, or any interest in such property. The Convention shall also not apply in respect of (i) the creation or execution of a will; or (ii) the creation, performance or enforcement of an indenture, declaration of trust or power of attorney, that may be contracted for in any contract governed by the Convention.

<sup>b</sup> Upon acceptance, the Russian Federation declared:

1. In accordance with article 19, paragraph 1, of the Convention, the Russian Federation will apply the Convention when the parties to the international contract have agreed that it applies;
2. In accordance with article 19, paragraph 2, of the Convention, the Russian Federation will not apply the Convention to transactions for which a notarized form or State registration is required under Russian law or to transactions for the sale of goods whose transfer across the Customs Union border is either prohibited or restricted;
3. The Russian Federation understands the international contracts covered by the Convention to mean civil law contracts involving foreign citizens or legal entities, or a foreign element.



## I. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008)

<i>State</i>	<i>Signature</i>	<i>Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)</i>
Armenia	29 September 2009	
Cameroon	29 September 2009	
Congo	23 September 2009	28 January 2014
Democratic Republic of the Congo	23 September 2010	
Denmark	23 September 2009	
France	23 September 2009	
Gabon	23 September 2009	
Ghana	23 September 2009	
Greece	23 September 2009	
Guinea	23 September 2009	
Guinea-Bissau	24 September 2013	
Luxembourg	31 August 2010	
Madagascar	25 September 2009	
Mali	26 October 2009	
Netherlands	23 September 2009	
Niger	22 October 2009	
Nigeria	23 September 2009	
Norway	23 September 2009	
Poland	23 September 2009	
Senegal	23 September 2009	
Spain	23 September 2009	19 January 2011
Sweden	20 July 2011	
Switzerland	23 September 2009	
Togo	23 September 2009	17 July 2012
United States of America	23 September 2009	

**Parties:3**

## J. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

<i>State</i>	<i>Signature</i>	<i>Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)</i>	<i>Entry into force</i>
Afghanistan <sup>a,c</sup>		30 November 2004 <sup>(*)</sup>	28 February 2005
Albania		27 June 2001 <sup>(*)</sup>	25 September 2001
Algeria <sup>a, c</sup>		7 February 1989 <sup>(*)</sup>	8 May 1989
Antigua and Barbuda <sup>a,c</sup>		2 February 1989 <sup>(*)</sup>	3 May 1989
Argentina <sup>a,c</sup>	26 August 1958	14 March 1989	12 June 1989
Armenia <sup>a,c</sup>		29 December 1997 <sup>(*)</sup>	29 March 1998
Australia		26 March 1975 <sup>(*)</sup>	24 June 1975
Austria		2 May 1961 <sup>(*)</sup>	31 July 1961
Azerbaijan		29 February 2000 <sup>(*)</sup>	29 May 2000
Bahamas		20 December 2006 <sup>(*)</sup>	20 March 2007
Bahrain <sup>a,c</sup>		6 April 1988 <sup>(*)</sup>	5 July 1988
Bangladesh		6 May 1992 <sup>(*)</sup>	4 August 1992
Barbados <sup>a,c</sup>		16 March 1993 <sup>(*)</sup>	14 June 1993
Belarus <sup>b</sup>	29 December 1958	15 November 1960	13 February 1961
Belgium <sup>a</sup>	10 June 1958	18 August 1975	16 November 1975

<i>State</i>	<i>Signature</i>	<i>Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)</i>	<i>Entry into force</i>
Benin		16 May 1974(*)	14 August 1974
Bolivia (Plurinational State of)		28 April 1995(*)	27 July 1995
Bosnia and Herzegovina <sup>a,c,i</sup>		1 September 1993(§)	6 March 1992
Botswana <sup>a,c</sup>		20 December 1971(*)	19 March 1972
Brazil		7 June 2002(*)	5 September 2002
Brunei Darussalam <sup>a</sup>		25 July 1996(*)	23 October 1996
Bulgaria <sup>a,b</sup>	17 December 1958	10 October 1961	8 January 1962
Burkina Faso		23 March 1987(*)	21 June 1987
Cambodia		5 January 1960(*)	4 April 1960
Cameroon		19 February 1988(*)	19 May 1988
Canada <sup>d</sup>		12 May 1986(*)	10 August 1986
Central African Republic <sup>a,c</sup>		15 October 1962(*)	13 January 1963
Chile		4 September 1975(*)	3 December 1975
China <sup>a,c,h</sup>		22 January 1987(*)	22 April 1987
Colombia		25 September 1979(*)	24 December 1979
Cook Islands		12 January 2009(*)	12 April 2009
Costa Rica	10 June 1958	26 October 1987	24 January 1988
Côte d'Ivoire		1 February 1991(*)	2 May 1991
Croatia <sup>a,c,i</sup>		26 July 1993(§)	8 October 1991
Cuba <sup>a,c</sup>		30 December 1974(*)	30 March 1975
Cyprus <sup>a,c</sup>		29 December 1980(*)	29 March 1981
Czech Republic <sup>a,b</sup>		30 September 1993(§)	1 January 1993
Denmark <sup>a,c,f</sup>		22 December 1972(*)	22 March 1973
Djibouti <sup>a,c</sup>		14 June 1983(§)	27 June 1977
Dominica		28 October 1988(*)	26 January 1989
Dominican Republic		11 April 2002(*)	10 July 2002
Ecuador <sup>a,c</sup>	17 December 1958	3 January 1962	3 April 1962
Egypt		9 March 1959(*)	7 June 1959
El Salvador	10 June 1958	26 February 1998	27 May 1998
Estonia		30 August 1993(*)	28 November 1993
Fiji		27 September 2010(*)	26 December 2010
Finland	29 December 1958	19 January 1962	19 April 1962
France <sup>a</sup>	25 November 1958	26 June 1959	24 September 1959
Gabon		15 December 2006(*)	15 March 2007
Georgia		2 June 1994(*)	31 August 1994
Germany	10 June 1958	30 June 1961	28 September 1961
Ghana		9 April 1968(*)	8 July 1968
Greece <sup>a,c</sup>		16 July 1962(*)	14 October 1962
Guatemala <sup>a,c</sup>		21 March 1984(*)	19 June 1984
Guinea		23 January 1991(*)	23 April 1991
Haiti		5 December 1983(*)	4 March 1984
Holy See <sup>a,c</sup>		14 May 1975(*)	12 August 1975
Honduras		3 October 2000(*)	1 January 2001
Hungary <sup>a,c</sup>		5 March 1962(*)	3 June 1962
Iceland		24 January 2002(*)	24 April 2002
India <sup>a,c</sup>	10 June 1958	13 July 1960	11 October 1960
Indonesia <sup>a,c</sup>		7 October 1981(*)	5 January 1982
Iran (Islamic Republic of) <sup>a,c</sup>		15 October 2001(*)	13 January 2002
Ireland <sup>a</sup>		12 May 1981(*)	10 August 1981
Israel	10 June 1958	5 January 1959	7 June 1959
Italy		31 January 1969(*)	1 May 1969

<i>State</i>	<i>Signature</i>	<i>Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)</i>	<i>Entry into force</i>
Jamaica <sup>a,c</sup>		10 July 2002(*)	8 October 2002
Japan <sup>a</sup>		20 June 1961(*)	18 September 1961
Jordan	10 June 1958	15 November 1979	13 February 1980
Kazakhstan		20 November 1995(*)	18 February 1996
Kenya <sup>a</sup>		10 February 1989(*)	11 May 1989
Kuwait <sup>a</sup>		28 April 1978(*)	27 July 1978
Kyrgyzstan		18 December 1996(*)	18 March 1997
Lao People's Democratic Republic		17 June 1998(*)	15 September 1998
Latvia		14 April 1992(*)	13 July 1992
Lebanon <sup>a</sup>		11 August 1998(*)	9 November 1998
Lesotho		13 June 1989(*)	11 September 1989
Liberia		16 September 2005(*)	15 December 2005
Liechtenstein <sup>a</sup>		7 July 2011(*)	5 October 2011
Lithuania <sup>b</sup>		14 March 1995(*)	12 June 1995
Luxembourg <sup>a</sup>	11 November 1958	9 September 1983	8 December 1983
Madagascar <sup>a,c</sup>		16 July 1962(*)	14 October 1962
Malaysia <sup>a,c</sup>		5 November 1985(*)	3 February 1986
Mali		8 September 1994(*)	7 December 1994
Malta <sup>a,i</sup>		22 June 2000(*)	20 September 2000
Marshall Islands		21 December 2006(*)	21 March 2007
Mauritania		30 January 1997(*)	30 April 1997
Mauritius		19 June 1996(*)	17 September 1996
Mexico		14 April 1971(*)	13 July 1971
Monaco <sup>a, c</sup>	31 December 1958	2 June 1982	31 August 1982
Mongolia <sup>a,c</sup>		24 October 1994(*)	22 January 1995
Montenegro <sup>a,c,i</sup>		23 October 2006(§)	3 June 2006
Morocco <sup>a</sup>		12 February 1959(*)	7 June 1959
Mozambique <sup>a</sup>		11 June 1998(*)	9 September 1998
Myanmar		16 April 2013(*)	15 July 2013
Nepal <sup>a,c</sup>		4 March 1998(*)	2 June 1998
Netherlands <sup>a,c</sup>	10 June 1958	24 April 1964	23 July 1964
New Zealand <sup>a</sup>		6 January 1983(*)	6 April 1983
Nicaragua		24 September 2003(*)	23 December 2003
Niger		14 October 1964(*)	12 January 1965
Nigeria <sup>a,c</sup>		17 March 1970(*)	15 June 1970
Norway <sup>a,j</sup>		14 March 1961(*)	12 June 1961
Oman		25 February 1999(*)	26 May 1999
Pakistan <sup>a</sup>	30 December 1958	14 July 2005	12 October 2005
Panama		10 October 1984(*)	8 January 1985
Paraguay		8 October 1997(*)	6 January 1998
Peru		7 July 1988(*)	5 October 1988
Philippines <sup>a,c</sup>	10 June 1958	6 July 1967	4 October 1967
Poland <sup>a,c</sup>	10 June 1958	3 October 1961	1 January 1962
Portugal <sup>a</sup>		18 October 1994(*)	16 January 1995
Qatar		30 December 2002(*)	30 March 2003
Republic of Korea <sup>a,c</sup>		8 February 1973(*)	9 May 1973
Republic of Moldova <sup>a,i</sup>		18 September 1998(*)	17 December 1998
Romania <sup>a,b,c</sup>		13 September 1961(*)	12 December 1961
Russian Federation <sup>b</sup>	29 December 1958	24 August 1960	22 November 1960
Rwanda		31 October 2008	29 January 2009
Saint Vincent and the Grenadines <sup>a,c</sup>		12 September 2000(*)	11 December 2000

<i>State</i>	<i>Signature</i>	<i>Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)</i>	<i>Entry into force</i>
San Marino		17 May 1979(*)	15 August 1979
Sao Tome and Principe		20 November 2012(*)	18 February 2013
Saudi Arabia <sup>a</sup>		19 April 1994(*)	18 July 1994
Senegal		17 October 1994(*)	15 January 1995
Serbia <sup>a,c,i</sup>		12 March 2001(§)	27 April 1992
Singapore <sup>a</sup>		21 August 1986(*)	19 November 1986
Slovakia <sup>a,b</sup>		28 May 1993(§)	1 January 1993
Slovenia <sup>i</sup>		6 July 1992(§)	25 June 1991
South Africa		3 May 1976(*)	1 August 1976
Spain		12 May 1977(*)	10 August 1977
Sri Lanka	30 December 1958	9 April 1962	8 July 1962
Sweden	23 December 1958	28 January 1972	27 April 1972
Switzerland	29 December 1958	1 June 1965	30 August 1965
Syrian Arab Republic		9 March 1959(*)	7 June 1959
Tajikistan <sup>a,i,j</sup>		14 August 2012(*)	12 November 2012
Thailand		21 December 1959(*)	20 March 1960
The former Yugoslav Republic of Macedonia <sup>c,i</sup>		10 March 1994(§)	17 November 1991
Trinidad and Tobago <sup>a,c</sup>		14 February 1966(*)	15 May 1966
Tunisia <sup>a,c</sup>		17 July 1967(*)	15 October 1967
Turkey <sup>a,c</sup>		2 July 1992(*)	30 September 1992
Uganda <sup>a</sup>		12 February 1992(*)	12 May 1992
Ukraine <sup>b</sup>	29 December 1958	10 October 1960	8 January 1961
United Arab Emirates		21 August 2006(*)	19 November 2006
United Kingdom of Great Britain and Northern Ireland <sup>a,g</sup>		24 September 1975(*)	23 December 1975
United Republic of Tanzania <sup>a</sup>		13 October 1964(*)	11 January 1965
United States of America <sup>a,c</sup>		30 September 1970(*)	29 December 1970
Uruguay		30 March 1983(*)	28 June 1983
Uzbekistan		7 February 1996(*)	7 May 1996
Venezuela (Bolivarian Republic of) <sup>a,c</sup>		8 February 1995(*)	9 May 1995
Viet Nam <sup>a,b,c</sup>		12 September 1995(*)	11 December 1995
Zambia		14 March 2002(*)	12 June 2002
Zimbabwe		29 September 1994(*)	28 December 1994

### Parties: 149

#### Declarations or other notifications pursuant to article I(3) and article X(1)

<sup>a</sup> This State will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State.

<sup>b</sup> With regard to awards made in the territory of non-contracting States, this State will apply the Convention only to the extent to which those States grant reciprocal treatment.

<sup>c</sup> This State will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.

<sup>d</sup> Canada declared that it would apply the Convention only to differences arising out of legal relationships, whether contractual or not, that were considered commercial under the laws of Canada, except in the case of the Province of Quebec, where the law did not provide for such limitation.

<sup>e</sup> On 24 April 1964, the Netherlands declared that the Convention shall apply to the Netherlands Antilles.

<sup>f</sup> On 10 February 1976, Denmark declared that the Convention shall apply to the Faroe Islands and Greenland.

<sup>g</sup> On 24 February 2014, the United Kingdom submitted a notification to extend territorial application of the Convention to the British Virgin Islands. For the following territories, the United Kingdom has submitted notifications extending territorial application and declaring that the Convention shall apply only to the recognition and enforcement of awards made in the territory of another Contracting State: Gibraltar (24 September 1975), Isle of Man (22 February 1979), Bermuda (14 November 1979), Cayman Islands (26 November 1980), Guernsey (19 April 1985), Bailiwick of Jersey (28 May 2002).

<sup>h</sup> Upon resumption of sovereignty over Hong Kong on 1 July 1997, the Government of China extended the territorial application of the Convention to Hong Kong, Special Administrative Region of China, subject to the statement originally made by China upon accession to the Convention. On 19 July 2005, China declared that the Convention shall apply to the Macao Special Administrative Region of China, subject to the statement originally made by China upon accession to the Convention.

### Reservations or other notifications

<sup>i</sup> This State formulated a reservation with regards to retroactive application of the Convention.

<sup>j</sup> This State formulated a reservation with regards to the application of the Convention in cases concerning immovable property.

## II. Enactments of model laws<sup>27</sup>

### A. UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006

8. Legislation based on the Model Law has been adopted in:

Armenia (2006); Australia (2010<sup>a, c</sup>), in New South Wales (2010<sup>a</sup>), Northern Territory (2011<sup>a</sup>), Queensland (2013<sup>a</sup>), South Australia (2011<sup>a</sup>), Tasmania (2011<sup>a</sup>), Victoria (2011<sup>a</sup>), and Western Australia (2012<sup>a</sup>); Austria (2006); Azerbaijan (1999); Bahrain (1994); Bangladesh (2001); Belarus (1999); Belgium (2013<sup>a</sup>); Brunei Darussalam (2009<sup>a</sup>); Bulgaria (2002<sup>c</sup>); Cambodia (2006); Canada (1986), in Alberta (1986), British Columbia (1986), Manitoba (1986), New Brunswick (1986), Newfoundland and Labrador (1986), Northwest Territories (1986), Nova Scotia (1986), Nunavut (1999), Ontario (1987), Prince Edward Island (1986), Quebec (1986), Saskatchewan (1988), and Yukon (1986); Chile (2004); China, in Hong Kong, China (2010<sup>a, c</sup>) and Macao, China (1998); Costa Rica (2011<sup>a</sup>); Croatia (2001); Cyprus (1987); Denmark (2005); Dominican Republic (2008); Egypt (1994); Estonia (2006); Georgia (2009<sup>a</sup>); Germany (1998); Greece (1999); Guatemala (1995); Honduras (2000); Hungary (1994); India (1996); Iran (Islamic Republic of) (1997); Ireland (2010<sup>a, c</sup>); Japan (2003); Jordan (2001); Kenya (1995); Lithuania (2012<sup>a, c</sup>); Madagascar (1998); Malta (1996); Mauritius (2008<sup>a</sup>); Mexico (1993); New Zealand (2007<sup>a, c</sup>); Nicaragua (2005); Nigeria (1990); Norway (2004); Oman (1997); Paraguay (2002); Peru (2008<sup>a, c</sup>); Philippines (2004); Poland (2005); Republic of Korea (1999); Russian Federation (1993); Rwanda (2008<sup>a</sup>); Serbia (2006); Singapore (1994<sup>d</sup>); Slovenia (2008<sup>a</sup>); Spain (2003); Sri Lanka (1995); Thailand (2002); the former Yugoslav Republic of Macedonia (2006); Tunisia (1993); Turkey (2001); Uganda (2000); Ukraine (1994); United Kingdom of Great Britain and Northern Ireland, in Bermuda (1993<sup>b</sup>), and Scotland (1990); United States of America, in California (1988), Connecticut (1989), Florida (2010<sup>a</sup>), Georgia (2012), Illinois (1998), Louisiana (2006), Oregon (1991),

<sup>27</sup> Since States enacting legislation based upon a model law have the flexibility to depart from the text, these lists are only indicative of the enactments that were made known to the UNCITRAL Secretariat. The legislation of each State should be considered in order to identify the exact nature of any possible deviation from the model in the legislative text that was adopted. The year of enactment provided in this note is the year the legislation was passed by the relevant legislative body, as indicated to the UNCITRAL Secretariat; it does not address the date of entry into force of that piece of legislation, the procedures for which vary from State to State, and could result in entry into force some time after enactment. In addition, there may be subsequent amending or repealing legislation that has not been made known to the UNCITRAL Secretariat.

and Texas (1989); Venezuela (Bolivarian Republic of) (1998); Zambia (2000); and Zimbabwe (1996).

<sup>a</sup> Indicates legislation based on the text of the UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006.

<sup>b</sup> Overseas territory of the United Kingdom of Great Britain and Northern Ireland.

<sup>c</sup> The legislation amends previous legislation based on the Model Law.

<sup>d</sup> The legislation has been further amended in 2001, 2003, 2005 and 2009.

## B. UNCITRAL Model Law on International Credit Transfers (1992)

9. A directive of the European Parliament and of the Council of the European Union based on the principles of the UNCITRAL Model Law on International Credit Transfers was issued on 27 January 1997.

## C. UNCITRAL Model Law on Electronic Commerce (1996)

10. Legislation based on or influenced by the Model Law has been adopted in:

Antigua and Barbuda (2006<sup>d</sup>); Australia (2011<sup>e,h</sup>), in Australian Capital Territory (2012<sup>e,h</sup>), New South Wales (2010<sup>e,h</sup>), Northern Territory (2011<sup>e,h</sup>), Queensland (2013<sup>e,h</sup>), South Australia (2011<sup>e,h</sup>), Tasmania (2010<sup>e,h</sup>), Victoria (2011<sup>e,h</sup>), and Western Australia (2011<sup>e,h</sup>); Bahrain (2002); Bangladesh (2006<sup>a,d</sup>); Barbados (2001); Belize (2003); Brunei Darussalam (2000); Canada, in Alberta (2001<sup>b</sup>), British Columbia (2001<sup>b</sup>), Manitoba (2000<sup>b</sup>), New Brunswick (2001<sup>b</sup>), Newfoundland and Labrador (2001<sup>b</sup>), Northwest Territories (2011<sup>b</sup>), Nova Scotia (2000<sup>b</sup>), Nunavut (2004<sup>b</sup>), Ontario (2001<sup>b</sup>), Prince Edward Island (2001<sup>b</sup>), Quebec (2001<sup>d</sup>), Saskatchewan (2000<sup>b</sup>), and Yukon (2000<sup>b</sup>); Cape Verde (2003); China (2004), in Hong Kong, China (2000), and Macao, China (2005<sup>d,h</sup>); Colombia (1999<sup>a</sup>); Dominican Republic (2002<sup>a</sup>); Ecuador (2002<sup>a</sup>); Fiji (2008); France (2000); Gambia (2009<sup>e</sup>); Ghana (2008<sup>e</sup>); Grenada (2008); Guatemala (2008<sup>e</sup>); India (2000<sup>a</sup>); Iran (Islamic Republic of) (2004); Ireland (2000); Jamaica (2006); Jordan (2001); Lao People's Democratic Republic (2012<sup>a</sup>); Liberia (2002<sup>a</sup>); Malaysia (2006); Mauritius (2000); Mexico (2000); New Zealand (2002); Oman (2008<sup>a</sup>); Pakistan (2002); Panama (2001<sup>a</sup>); Paraguay (2010); Philippines (2000); Qatar (2010<sup>e</sup>); Republic of Korea (1999); Rwanda (2010<sup>e</sup>); Saint Kitts and Nevis (2011<sup>e</sup>); Saint Lucia (2011); Saint Vincent and the Grenadines (2007); Samoa (2008); San Marino (2013<sup>e</sup>); Saudi Arabia (2007); Seychelles (2001<sup>a</sup>); Singapore (2010<sup>e,h</sup>); Slovenia (2000); South Africa (2002<sup>a</sup>); Sri Lanka (2006); Syrian Arab Republic (2014<sup>a,d</sup>); Thailand (2002); Trinidad and Tobago (2011<sup>e</sup>); United Arab Emirates (2006); United Kingdom of Great Britain and Northern Ireland, in Bailiwick of Guernsey (2000<sup>f</sup>), Bailiwick of Jersey (2000<sup>f</sup>), Bermuda (1999<sup>g</sup>), Cayman Islands (2000<sup>g</sup>), Isle of Man (2000<sup>f</sup>), and the Turks and Caicos Islands (2000<sup>g</sup>); United States of America, in Alabama (2001<sup>e</sup>), Alaska (2004<sup>e</sup>), Arizona (2000<sup>e</sup>), Arkansas (2001<sup>e</sup>), California (1999<sup>e</sup>), Colorado (2002<sup>e</sup>), Connecticut (2002<sup>e</sup>), Delaware (2000<sup>e</sup>), District of Columbia (2001<sup>e</sup>), Florida (2000<sup>e</sup>), Georgia (2009<sup>e</sup>); Hawaii (2000<sup>e</sup>), Idaho (2000<sup>e</sup>), Illinois (1998), Indiana (2000<sup>e</sup>), Iowa (2000<sup>e</sup>), Kansas (2000<sup>e</sup>), Kentucky (2000<sup>e</sup>), Louisiana (2001<sup>e</sup>), Maine (2000<sup>e</sup>), Maryland (2000<sup>e</sup>), Massachusetts (2003<sup>e</sup>), Michigan (2000<sup>e</sup>), Minnesota (2000<sup>e</sup>), Mississippi (2001<sup>e</sup>), Missouri (2003<sup>e</sup>), Montana (2001<sup>e</sup>), Nebraska (2000<sup>e</sup>), Nevada (2001<sup>e</sup>), New Hampshire (2001<sup>e</sup>), New Jersey (2000<sup>e</sup>), New Mexico (2001<sup>e</sup>), North Carolina (2000<sup>e</sup>), North Dakota (2001<sup>e</sup>), Ohio (2000<sup>e</sup>), Oklahoma (2000<sup>e</sup>), Oregon (2001<sup>e</sup>), Pennsylvania (1999<sup>e</sup>), Rhode Island (2000<sup>e</sup>), South Carolina (2004<sup>e</sup>), South Dakota (2000<sup>e</sup>), Tennessee (2001<sup>e</sup>), Texas (2001<sup>e</sup>), Utah (2000<sup>e</sup>), Vermont (2003<sup>e</sup>), Virginia (2000<sup>e</sup>), West Virginia (2001<sup>e</sup>), Wisconsin (2004<sup>e</sup>), and Wyoming (2001<sup>e</sup>); Vanuatu (2000); Venezuela (Bolivarian Republic of) (2001); Viet Nam (2005<sup>e</sup>); and Zambia (2009<sup>e</sup>).

<sup>a</sup> Except for the provisions on certification and electronic signatures.

<sup>b</sup> The legislation enacts uniform legislation influenced by the Model Law and the principles on which it is based, namely, the Uniform Electronic Commerce Act, adopted in 1999 by the Uniform Law Conference of Canada.

<sup>c</sup> The legislation enacts uniform legislation influenced by the Model Law and the principles on which it is based, namely, the Uniform Electronic Transactions Act, adopted in 1999 by the National Conference of Commissioners on Uniform State Law.

<sup>d</sup> The legislation is influenced by the Model Law and the principles on which it is based.

<sup>e</sup> The legislation also includes substantive provisions of the United Nations Convention on the Use of Electronic Communications in International Contracts, the status of which can be found in part I, sect. H.

<sup>f</sup> Crown Dependency of the United Kingdom of Great Britain and Northern Ireland.

<sup>g</sup> Overseas territory of the United Kingdom of Great Britain and Northern Ireland.

<sup>h</sup> The legislation amends previous legislation based on the Model Law.

#### **D. UNCITRAL Model Law on Cross-Border Insolvency (1997)**

11. Legislation based on the Model Law has been adopted in:

Australia (2008); Canada (2005); Chile (2014); Colombia (2006); Eritrea (1998); Greece (2010); Japan (2000); Mauritius (2009); Mexico (2000); Montenegro (2002); New Zealand (2006); Poland (2003); Republic of Korea (2006); Romania (2002); Serbia (2004); Slovenia (2007); South Africa (2000); Uganda (2011); United Kingdom of Great Britain and Northern Ireland, in Great Britain (2006), and the British Virgin Islands, overseas territory of the United Kingdom (2003); and the United States of America (2005).

#### **E. UNCITRAL Model Law on Electronic Signatures (2001)**

12. Legislation based on or influenced by the Model Law has been adopted in:

Antigua and Barbuda (2006); Barbados (2001); Cape Verde (2003); China (2004); Colombia (2012); Costa Rica (2005<sup>a</sup>); Gambia (2009); Ghana (2008); Grenada (2008); Guatemala (2008); Honduras (2013); India (2009<sup>a</sup>); Jamaica (2006); Mexico (2003); Nicaragua (2010a); Oman (2008<sup>a</sup>); Paraguay (2010); Qatar (2010); Rwanda (2010); Saint Kitts and Nevis (2011); Saint Lucia (2011); Saint Vincent and the Grenadines (2007); San Marino (2013); Saudi Arabia (2007<sup>a</sup>); Thailand (2001); Trinidad and Tobago (2011); United Arab Emirates (2006); Viet Nam (2005); and Zambia (2009).

<sup>a</sup> The legislation is influenced by the Model Law and the principles on which it is based.

#### **F. UNCITRAL Model Law on International Commercial Conciliation (2002)**

13. Legislation based on or influenced by the Model Law has been adopted in:

Albania (2011d); Belgium (2005); Canada, in Nova Scotia (2005<sup>b</sup>), and Ontario (2010<sup>b</sup>); Croatia (2003); France (2011<sup>c</sup>); Honduras (2000); Hungary (2002); Luxembourg (2012); Montenegro (2005<sup>c</sup>); Nicaragua (2005); Slovenia (2008); Switzerland (2008<sup>c</sup>) the former Yugoslav Republic of Macedonia (2009); United States of America, in the District of Columbia (2006<sup>a</sup>), Hawaii (2013<sup>a</sup>); Idaho (2008<sup>a</sup>), Illinois (2004<sup>a</sup>), Iowa (2005<sup>a</sup>), Nebraska (2003<sup>a</sup>), New Jersey (2004<sup>a</sup>), Ohio (2005<sup>a</sup>), South Dakota (2007<sup>a</sup>), Utah (2006<sup>a</sup>), Vermont (2005<sup>a</sup>), and Washington (2005<sup>a</sup>).

<sup>a</sup> The legislation enacts uniform legislation influenced by the Model Law and the principles on which it is based; namely, the Uniform Mediation Act, adopted in 2001 (amended in 2003) by the National Conference of Commissioners on Uniform State Laws.

<sup>b</sup> The legislation enacts uniform legislation influenced by the Model Law and the principles on which it is based; namely, the Uniform [International] Commercial Mediation Act, adopted in 2005 by the Uniform Law Conference of Canada.

<sup>c</sup> The legislation is influenced by the Model Law and the principles on which it is based.

<sup>d</sup> The legislation amends previous legislation based on the Model Law.

**G. UNCITRAL Model Law on Public Procurement (2011)<sup>28</sup>**

14. The UNCITRAL Model Law on Public Procurement was adopted by the Commission on 1 July 2011. States are now considering enactment of legislation based on the Model Law.

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<sup>28</sup> The UNCITRAL Model Law on Public Procurement (2011) is a revision of the UNCITRAL Model Law on Procurement of Goods and Construction (1993), *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17)*, annex I. Historical status information on the UNCITRAL Model Law on Procurement of Goods and Construction (1993) is available on the UNCITRAL website, [www.uncitral.org/uncitral/uncitral\\_texts.html](http://www.uncitral.org/uncitral/uncitral_texts.html).



# XI. COORDINATION AND COOPERATION

## Note by the Secretariat on coordination activities

(A/CN.9/809)

[Original: English]

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## I. Introduction

1. In resolution 34/142 of 17 December 1979, the General Assembly requested the Secretary-General to place before the United Nations Commission on International Trade Law a report on the legal activities of international organizations in the field of international trade law, together with recommendations as to the steps to be taken by the Commission to fulfil its mandate of coordinating the activities of other organizations in the field.

2. In resolution 36/32 of 13 November 1981, the General Assembly endorsed various suggestions by the Commission to implement further its coordinating role in the field of international trade law.<sup>1</sup> Those suggestions included presenting, in addition to a general report of activities of international organizations, reports on specific areas of activity focusing on work already under way and areas where unification work was not under way but could appropriately be undertaken.<sup>2</sup>

3. This report, prepared in response to resolution 34/142 and in accordance with UNCITRAL's mandate,<sup>3</sup> provides information on the activities of other international organizations active in the field of international trade law in which the UNCITRAL secretariat has participated, principally working groups, expert groups and plenary meetings. The purpose of that participation has been to ensure coordination of the related activities of the different organizations, share information and expertise and avoid duplication of work and the resultant work products.

4. The Commission may wish to note the increasing involvement of the Secretariat in initiatives of other organizations. This is a recurrent pattern in recent years, consistent with the increase in the Secretariat's technical assistance activities,<sup>4</sup> and which is expected to continue and even increase in future.

## II. Coordination activities

### A. The International Institute for the Unification of Private Law and the Hague Conference on Private International Law

*International Institute for the Unification of Private Law (Unidroit)*

5. The Secretariat participated in the ninety-second session of the Unidroit Governing Council (Rome, 8-10 May 2013). At that session, among other things, the

<sup>1</sup> *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17 (A/36/17)*, paras. 93-101.

<sup>2</sup> *Ibid.*, para. 100.

<sup>3</sup> See General Assembly Resolution 2205 (XXI), sect. II, para. 8.

<sup>4</sup> See A/CN.9/775.

Governing Council adopted the Model Clauses for the Use of the Unidroit Principles of International Commercial Contracts. As per the statement made on behalf of Unidroit at the forty-sixth session of the Commission, in 2013, the UNCITRAL secretariat had provided comments to the draft Model Clauses in order to clarify the relationship between the Unidroit Principles and article 7 of the United Nations Sales Convention. Those observations had been reflected through an amendment to the comments accompanying the Model Clauses.<sup>5</sup>

#### *Hague Conference on Private International Law (Hcch)*

6. The Secretariat participated as an observer in meetings of the Hcch Working Group on Choice of Law in International Contracts (The Hague, The Netherlands, 24-26 June 2013 and 27-28 January 2014). Over the course of these meetings, the Working Group continued its work on a non-binding instrument, i.e. a draft set of principles on choice of law in international commercial contracts and related commentary. The principles and the commentary are projected to be finalized within the next year.

7. The chairperson of UNCITRAL participated in the Hcch Council on General Affairs and Policy (The Hague, The Netherlands, 8-10 April 2014). The chairperson thanked the Hcch and the Working Group on Choice of Law in International Contracts for their continued close cooperation with the UNCITRAL secretariat on this project. In addition, the chairperson noted that the Hcch may wish to submit, once finalized, the principles on choice of law in international commercial contracts to UNCITRAL for consideration for endorsement at a future session of the Commission.

#### *Joint activities with Unidroit and Hcch*

8. The UNCITRAL secretariat participated in the tri-partite coordination meeting with Unidroit and Hcch, hosted by the Hcch, at which current work of the three organizations and potential areas for cooperation were discussed (The Hague, The Netherlands, 9-11 April 2014). The event consolidated the 2013 and 2014 meetings, since no meeting took place in 2013.

## **B. Other organizations**

9. The Secretariat undertook other coordination activities with various international organizations. Most of such activities included provision of comments on documents drafted by those organizations, and participation in various meetings and conferences with the purpose of briefing about the work of UNCITRAL or to provide an UNCITRAL perspective on the matters at stake.

### **1. General**

10. The Secretariat remained actively involved in the Inter-Agency Cluster on Trade and Productive Capacity<sup>6</sup> attending meetings (via audio conference) and providing inputs to different documents and initiatives of the Cluster. In the period under review, the Secretariat did not take part in any outreaching event of the Cluster.

11. Upon request of the Italian Government, the Secretariat held consultations with the Italian Ministry of Foreign Affairs and other public and private entities (Rome, 6-7 May 2013).

12. The Secretariat participated in the New York Global Law Week, organized by the New York State Bar Association, and delivered a speech at the concluding plenary session to address the theme “Developing International Commercial Law: The Next Challenges and Opportunities” (New York, United States of America, 17 May 2013).

<sup>5</sup> See also *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 252.

<sup>6</sup> See A/CN.9/725.

13. At the occasion of the twenty-seventh session of the UNCITRAL Working Group III (Online Dispute Resolution) (New York, United States of America, 20-24 May 2013), the Secretariat also held meetings with the Rule of Law Unit, Executive Office of the Secretary-General, which resulted in the Secretariat drafting a guidance note of the Secretary-General on the promotion of the rule of law in commercial relations (see para. 18 below).<sup>7</sup>

14. The Secretariat and the chairperson of UNCITRAL attended two high-level meetings: “Business for Peacebuilding”, co-convened by the United Nations Peacebuilding Commission (PBC) and the United Nations Global Compact; and “Entrepreneurship for Development”, a high-level thematic debate convened by the President of the General Assembly (New York, United States of America, 25-26 June 2013). These events provided the opportunity to highlight the work of UNCITRAL and its contribution to both peacebuilding and development. The UNCITRAL chairperson served as moderator of a panel at the peacebuilding event, bringing together stakeholders contributing to corporate activities in a peacebuilding context, either through project financing or commercial capacity development. He also intervened at the “Entrepreneurship for Development” event to outline how UNCITRAL’s work helps establish legal certainty in international commercial dealings, thereby furthering economic development.

15. The Secretariat was invited to participate in the initiatives of the Investment Security in the Mediterranean Support Programme (ISMED) which seeks to enhance the efficiency of legal investment protection measures and guarantee instruments available for medium-to-large scale infrastructure projects in the Southern Mediterranean region. The Programme is implemented by the Middle East and North Africa Investment Programme (MENA) of the Organization for Economic Cooperation and Development (OECD). The Secretariat attended an Informal Meeting of the ISMED Working Group (Paris, 12 September 2013) and the official launch of such Working Group (Paris, 9 December 2013), which will include MENA economies, OECD member countries, and invited international organizations, individual experts or representatives of companies and agencies involved in the field. Arbitration and international dispute settlement being one of the focus areas of the Working Group, the UNCITRAL secretariat has been invited to chair the relevant task force.

#### *Rule of Law*

16. The Secretariat undertook or facilitated several coordination activities on the Rule of Law in those areas of work of the United Nations and other entities that are of general relevance to UNCITRAL. The activities listed below are in addition to those already reported at the forty-sixth session of the Commission, in 2013.<sup>8</sup>

17. The Secretariat contributed to the 2013 report of the Secretary-General on strengthening and coordinating United Nations rule of law activities (A/68/213) and to the preparation of the 2014 reports of the Secretary-General on “Globalization and its impact on the full enjoyment of all human rights” and on “Rule of law and its linkages with peace and security, human rights and development”. The Secretariat also provided comments on the draft Global Rule of Law Business Principles, currently under consideration by the United Nations Secretariat.

18. The Secretariat was invited to contribute a paper to the Inter-regional Workshop on Regional Organizations, the Rule of Law and Constitutional Governance, organized by the International Institute for Democracy and Electoral Assistance (International IDEA) (The Hague, The Netherlands, 16-17 October 2013).<sup>9</sup> A paper on UNCITRAL’s legal cooperation programmes with a regional dimension presented

<sup>7</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 272.

<sup>8</sup> *Ibid.*

<sup>9</sup> [www.idea.int/democracydialog/inter-regional-workshop-on-regional-organizations-rule-of-law-and-constitutional-governance.cfm](http://www.idea.int/democracydialog/inter-regional-workshop-on-regional-organizations-rule-of-law-and-constitutional-governance.cfm).

by the UNCITRAL secretariat to that workshop is expected to be published among materials of the workshop.

19. A draft guidance note of the Secretary-General on the United Nations approach to the promotion of the rule of law in commercial relations, about which the Commission was informed at its forty-sixth session, in 2013,<sup>10</sup> was presented by the Office of Legal Affairs of the United Nations Secretariat at the expert level meeting of the Rule of Law Coordination and Resource Group of the United Nations<sup>11</sup> on 20 December 2013. The text is currently undergoing the final approval and is expected eventually to be circulated across the United Nations, including to the Resident Coordinators and country teams.

20. It may be recalled that, at its forty-sixth session, in 2013, the Commission learned about initiatives across the United Nations system to formulate sustainable development goals and a post-2015 international development agenda, in particular the work of the Open Working Group on Sustainable Development Goals.<sup>12</sup> At that time, the Commission noted the relevance of UNCITRAL work to these initiatives and requested its Bureau at the forty-sixth session and its Secretariat to take appropriate steps to ensure that the areas of work of UNCITRAL and the role of UNCITRAL in the promotion of the rule of law and sustainable development were not overlooked.<sup>13</sup> Pursuant to that request, efforts were made to ensure that the message of UNCITRAL is conveyed to the Open Working Group during its deliberations. As a result, the chairperson of UNCITRAL delivered a statement at the eighth session of the Open Working Group (New York, United States of America, 3-7 February 2014).<sup>14</sup> In addition, in cooperation with the Asian-African Legal Consultative Organization (AALCO), the International Development Law Organization (IDLO) and the International Chamber of Commerce (ICC), the UNCITRAL secretariat organized a side event on the margins of that session of the Open Working Group on the enabling environment for rule-based business, investment and trade (New York, United States of America, 6 February 2014).<sup>15</sup> On both occasions, the importance of duly taking into account the contribution of commercial law to the rule of law and sustainable development and the need to continuously build adequate capacity of States in the commercial law field were highlighted.

21. A similar message was conveyed at the IDLO-organized conference “Constructing the global agenda: the rule of law as a driver of change” (The Hague, The Netherlands, 2 April 2014) where the UNCITRAL secretariat addressed the conference under the theme “Looking beyond 2015: equality, opportunity, sustainability and the rule of law”.<sup>16</sup> The secretariats of UNCITRAL and IDLO explored ways for closer coordination and cooperation on issues of common interest, recognizing that “IDLO is the only intergovernmental organization with an exclusive mandate to promote the rule of law”<sup>17</sup> and UNCITRAL is “the core legal body within the United Nations system in the field of international trade law”.<sup>18</sup> Possible involvement of UNCITRAL in projects on the promotion of the rule of law implemented or planned by IDLO in several jurisdictions was particularly discussed.

<sup>10</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 273.

<sup>11</sup> [www.unrol.org/article.aspx?article\\_id=6](http://www.unrol.org/article.aspx?article_id=6).

<sup>12</sup> <http://sustainabledevelopment.un.org/owg.html>.

<sup>13</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, paras. 274-275.

<sup>14</sup> The statement by Mr. Michael Schoell is available at <http://sustainabledevelopment.un.org/owg8.html>, under “Statements & Presentations”.

<sup>15</sup> Information about the side event may be found at <http://sustainabledevelopment.un.org/owg8.html>.

<sup>16</sup> [www.idlo.int/news/highlights/constructing-global-agenda-rule-law-driver-change](http://www.idlo.int/news/highlights/constructing-global-agenda-rule-law-driver-change).

<sup>17</sup> [www.idlo.int/about-idlo/mission-and-history](http://www.idlo.int/about-idlo/mission-and-history).

<sup>18</sup> See e.g. most recently, General Assembly resolution 68/106, the fifth preambular paragraph.

## 2. Procurement

22. In accordance with requests of the Commission and Working Group I (under its former mandate on Public Procurement), the Secretariat has established links with other international organizations active in procurement reform to foster cooperation with regard to the UNCITRAL Model Law on Public Procurement (2011) and its accompanying Guide to Enactment (2012). The aims of such cooperation are to ensure that reforming governments and organizations are informed of the policy considerations underlying those texts, so as to promote a thorough understanding and appropriate use of the Model Law, at both regional and national levels. The Secretariat is taking a regional approach to this cooperation, and activities with the multilateral development banks in several regions, focusing on good governance and anti-corruption (in which procurement reform plays a pivotal role), are envisaged.

23. To this end, the Secretariat participated, among others, in the following activities:

(a) The work of the World Bank's International Advisory Group on Procurement, which advises the World Bank on its Procurement Policy Review, its new Program-for-Results (PforR) financing instrument, the procurement function in the context of public financial accountability, and the need to strengthen contract management. This included participation in a European members' meeting, hosted by the World Trade Organization (WTO), to review and comment on the World Bank's Independent Evaluation Group review into the existing system at the World Bank (Geneva, Switzerland, 14 November 2013), and a separate project to develop a system for benchmarking public procurement;

(b) The work of the team of specialists in Public-Private Partnerships (PPPs) of the United Nations Economic Commission for Europe (UNECE), which meets and reviews policy issues in PPPs, including on the role of PPPs in financing the post-2015 United Nations Development Agenda;

(c) The work of the OECD's Meeting of Leading Practitioners on Public Procurement and ongoing work on key issues in updating the OECD Recommendation on Enhancing Integrity in Public Procurement, the aim of which is to provide guidance to decision makers on how to use procurement as a strategic function of governments, and in designing procurement performance indicators (ensuring the performance indicators are based on UNCITRAL objectives); and

(d) The work of the Sustainable Public Procurement Initiative Network established by the United Nations Environment Programme (UNEP), including serving on its working groups on developing principles for sustainable public procurement, addressing legal barriers, and promoting collaboration between international organizations.

## 3. Dispute settlement

24. The Secretariat activities in the area of international commercial arbitration and conciliation included:

(a) Consultations in relation to a United Nations Conference on Trade and Development (UNCTAD) publication on investor State dispute settlement in order to ensure that this initiative takes account of the work of UNCITRAL in the field of transparency in treaty-based investor-State arbitration; and contribution to the UNCTAD's investment policy hub in relation to UNCITRAL's work in the field of transparency;

(b) Consultation and coordination work with the International Finance Corporation (IFC), World Bank Group, for the preparation of a note on "Arbitrating and Mediating Dispute Indicators", as part of the "Foreign Direct Investment Regulations Database" project; and

(c) Consultation with the International Court of Arbitration of the International Chamber of Commerce, the International Council for Commercial

Arbitration and the Chartered Institute of Arbitrators for the preparatory work on the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (1996).

#### 4. Electronic commerce

25. The Secretariat has been particularly active in coordinating with international and regional organizations involved in the formulation of legal standards in the field of electronic commerce to ensure their compatibility with UNCITRAL texts and principles.

26. Activities included the following:

(a) Upon invitation by the Arab Information and Communication Technology Organization, the Secretariat participate in the third Arab Forum on e-transactions Security & Public Key Infrastructure (PKI), Panel Four “Legal framework: toward PKI interoperability at the regional and international levels” (Tunis, 24-25 September 2013). The panel discussed the basic legal framework required for electronic transactions and the possibility to achieve interoperability among electronic signatures, including PKI-based ones;

(b) Ongoing coordination with the United Nations Centre for Trade Facilitation and E-business (UN/CEFACT) on the revision of UN/CEFACT Recommendation 14 (Authentication of trade documents) and work related to single windows interoperability (see A/CN.9/776) was ensured;

(c) The chairperson of UNCITRAL delivered the keynote speech at the conference “Facilitating Trade in the Digital Economy”, organized by the International Chamber of Commerce in cooperation with UNECE and the Federal Department of Foreign Affairs of the Swiss Confederation. In that speech, the chairperson stressed the importance of legislatively implementing the fundamental principles of UNCITRAL texts on electronic commerce, namely non-discrimination of electronic communications, technology neutrality and functional equivalence, and of ensuring the application of those principles to private and public sectors alike in order to create an enabling legal environment for paperless trade at the national and international levels.

#### 5. Security interests

27. Coordination with relevant organizations was pursued to ensure that States are offered comprehensive and consistent guidance in the area of secured transactions law.

28. Specific activities of the Secretariat included:

(a) Coordination with Unidroit to ensure that the Unidroit Principles on the Operation of Close-out Netting do not overlap or conflict with the security interests texts prepared by UNCITRAL;

(b) Coordination with the Hcch to ensure that the draft Hague Principles on the Choice of Law in International Contracts are consistent with the security interests texts prepared by UNCITRAL;

(c) Coordination with the World Bank to prepare a revised version of the World Bank Standard on Insolvency and Creditor Rights that would include the key principles of the UNCITRAL Legislative Guide on Secured Transactions;

(d) Coordination with IFC in providing law reform assistance to States in line with the recommendations of the UNCITRAL Legislative Guide on Secured Transactions;

(e) Coordination with the work of the Organization of American States in local-capacity building with respect to secured transactions; and

(f) Coordination with the European Commission to ensure that a coordinated approach is adopted with respect to the law applicable to third-party effects of assignments of receivables.

## 6. Commercial Fraud

29. Further to the request of the Commission (A/63/17, para. 347; A/64/17, para. 354, and A/68/17, para. 312) in relation to commercial fraud, the Secretariat continued to coordinate with the United Nations Office on Drugs and Crime (UNODC) in its work on economic crime and identity fraud. In particular, the Secretariat remains a member of UNODC's core group of experts on identity-related crime, which was formed to bring together on a regular basis representatives from governments, private sector entities, international and regional organizations and academia to pool experience, develop strategies, facilitate further research and agree on practical action against identity-related crime. Work planned by the UNODC core group of experts on the development of model legislation on identity-related crime did not proceed due to a lack of extrabudgetary resources, however the Secretariat will continue to participate in the core group of experts once its work proceeds. The Commission may also wish to note that UNODC also plans to develop, again subject to the availability of extrabudgetary funds, a web-based repository of information on identity-related crime, as well as a comprehensive package of training tools (see E/CN.15/2014/17, paras. 72 to 75 for more details).





*Part Three*

ANNEXES



# I. SUMMARY RECORDS OF THE MEETINGS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Summary record (partial) of the 984th meeting  
Held at Headquarters, New York, on Monday, 7 July 2014, at 10.30 a.m.

[A/CN.9/SR.984]

Chairperson: Mr. Moollan (Vice-Chair) (Mauritius)

*The discussion covered in the summary record began at 11.10 a.m.*

## Consideration of issues in the area of arbitration and conciliation

### (a) Finalization and approval of a draft convention on transparency in treaty-based investor-State arbitration (A/CN.9/794, 799, 812 and 813 and Add.1)

1. **The Chair** recalled that the Commission, at its forty-sixth session, had entrusted its Working Group II with the task of preparing a convention that provided an effective mechanism for the application, by those States that wished to use such a mechanism, of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration to investment treaties concluded before the Rules on Transparency came into force on 1 April 2014. Good progress had been achieved in the preparation of the draft text of the convention, which was almost finalized; the Working Group had completed two thorough readings of the text at its fifty-ninth and sixtieth sessions. He therefore invited the Commission to consider the text of the draft convention, as contained in document A/CN.9/812, article by article.

#### *Draft preamble*

2. Drawing attention to the text of the preamble as set out in paragraph 5 of document A/CN.9/812 and to the comments thereon as set out in paragraphs 6 to 9 of the same document, **the Chair** recalled the decision of the Working Group that the wording of the mandate given by the Commission to the Working Group should not be included in the preamble of the convention but rather should be included in the General Assembly resolution recommending the adoption of the convention. He also drew attention to paragraph 7, which contained a proposal by the secretariat to add a final paragraph to the preamble, to read “Noting also article 1(2) and (9) of the UNCITRAL Rules on Transparency,” and explained that the rationale for that additional paragraph was to clarify the purpose of the convention, namely to provide a mechanism for the application of the Rules on Transparency to existing investment treaties, and to arbitrations initiated under the UNCITRAL Arbitration Rules, other sets of rules or in ad hoc proceedings. He took it that the Commission wished to endorse the agreement of the Working Group with regard to

the wording of its mandate and to accept the proposal regarding the new final paragraph of the preamble.

3. *It was so agreed.*

4. *The draft preamble, as amended, was approved.*

#### *Draft article 1 — Scope of application*

5. **The Chair**, recalling the deliberations of the Working Group on draft article 1, drew attention to the fact that, rather than the term “treaty” as used in the Rules on Transparency, the term “investment treaty” was used in the draft convention to ensure clarity with regard to the superseding effect of the convention in relation to the investment treaties to which it would apply. If he heard no objections, he would take it that the use of that term was acceptable.

6. *It was so decided.*

7. *Draft article 1 was approved.*

#### *Draft article 2 — Application of the UNCITRAL Rules on Transparency*

##### *Paragraphs 1 and 2*

8. **The Chair** said that paragraphs 1 and 2 of article 2 distinguished between the effect of the convention where both the State of the investor and the respondent State in an arbitration were parties to the convention, in which case the Rules on Transparency would apply, and the effect where only the respondent State was a party to the convention, in which case the respondent could offer application of the Rules, the claimant thus having the choice of either proceeding with arbitration under the original investment treaty or under the Rules on Transparency. He drew attention to the proposal by the secretariat to delete the words “, as they may be revised from time to time,” in square brackets from the first and second paragraphs of the article (A/CN.9/812, paragraph 22) and to add a new third paragraph, also contained in square brackets in the draft text, in order to clarify that the most recent version of the Rules on Transparency as to which the respondent had not made a reservation would apply to an investor-State arbitration provided for under the first and second paragraphs of the article (A/CN.9/812, paragraph 24).

9. **Mr. Schöfisch** (Germany) said that his delegation preferred to retain the words “, as they may be revised from time to time,” in the text of the convention.

10. **The Chair** explained that the proposed deletion was intended not as a substantive change but rather to avoid the need to include the phrase “, as they may be revised from time to time,” each time that the Rules on Transparency were mentioned, and to clarify which version of the Rules would apply when the respondent State had made a reservation in respect of the most recent version.
11. **Mr. Schöfisch** (Germany) said that in the light of that explanation, the proposed deletion was acceptable, and asked that the clarification provided form part of the record of the Commission’s decisions relating to the draft convention.
12. **The Chair** said that the explanation would be reflected in the *Travaux Préparatoires*. He took it that the Commission wished to accept the proposed deletion throughout the text of the draft convention and the addition of the new paragraph 3 of draft article 2 as set out in square brackets.
13. *It was so decided.*
14. **Mr. Apter** (Israel), referring to paragraphs 1 and 2 of draft article 2, said that it was important to clarify that the convention would be a successive treaty only if both parties to a bilateral investment treaty were parties also to the convention. Where only one party to a bilateral investment treaty had acceded to the convention, that party should inform the other of its having done so.
15. **The Chair** said he took it that it was the Commission’s understanding that the convention would constitute a successive treaty but would not supersede an investment treaty where only one of the parties to that treaty was party to the convention.
16. *It was so agreed.*
17. **The Chair** took it that the Commission wished to approve draft article 2, paragraph 1, as amended by the deletion of the phrase in square brackets “[, as they may be revised from time to time,]”.
18. *It was so decided.*
19. **Mr. Apter** (Israel) proposed that the phrase “and the claimant agrees to the application of the UNCITRAL Rules on Transparency” in paragraph 2 be replaced with the phrase “provided that the claimant agrees explicitly and in writing to the application of the UNCITRAL Rules on Transparency” in order to clarify how exactly the claimant would agree to the unilateral application of the Rules.
20. **Mr. Baykitch** (Australia) asked whether the fact that the word “any” preceded the phrase “investor-State arbitration” in paragraph 1 of draft article 2 whereas the word “an” preceded the same phrase in paragraph 2 was intended to convey different concepts.
21. **The Chair** clarified that the word “any” was used in paragraph 1 to reflect the fact that that paragraph applied to all arbitrations falling within its scope, whereas the use of the word “an” in paragraph 2 indicated that that paragraph applied to specific arbitrations in which the respondent had offered to apply the Rules on Transparency unilaterally and the claimant had accepted that offer.
22. **Mr. Hamamoto** (Japan), referring to the proposal made by the representative of Israel, said that the text in question should not be amended. The legal basis for the application of the Rules on Transparency was not article 2(2) of the convention but rather article 1(2)(a) of the Rules themselves, which stipulated that the agreement of the parties was required in order for the Rules to apply, and article 1(9) of the Rules. However, the Rules did not require explicit written agreement by the claimant. It would therefore be better to ensure consistency in that regard between the Rules on Transparency and the convention rather than referring to a specific form of agreement.
23. **Mr. Marani** (Argentina) and **Ms. Pólit** (Ecuador) said that they supported the position stated by the representative of Japan.
24. **Mr. Von Walter** (Observer for the European Union) said that his delegation also supported that position and that the question of how agreement was expressed need not be dealt with in the convention but instead could be addressed by the applicable arbitration rules or determined by the arbitral tribunal.
25. **Mr. Limparangsri** (Thailand), endorsing the view that the wording of draft article 2(2) should not be amended, said that requiring the explicit consent of a claimant might raise problems in the future in that it might be argued that the agreement of the claimant was not explicit enough.
26. **Mr. Apter** (Israel) said that his delegation was willing to withdraw its proposal on the understanding that note would be taken of its concern that the fact that a claimant submitted a claim against a State where there was a unilateral offer of application of the Rules should not be construed as agreement to such application, and that the claimant’s agreement should refer explicitly to the Rules even if that agreement was not in writing.
27. **The Chair** said that the possibility of any misunderstanding with regard to a claimant’s acceptance of an offer of unilateral application of the Rules was unlikely in practice, as was indeed the case with regard to the acceptance of offers of arbitration made without reference to the Rules.
28. **Ms. Viscasillas** (Spain) proposed that the heading of paragraph 2 be amended to read “Irrevocable offer of application”, since such offers were by their nature unilateral and were usually irrevocable.
29. **Ms. Escobar Pacas** (El Salvador) expressed support for that proposal and wondered whether the heading could be amended in such a way as to clarify that only the respondent could make the offer of application of the Rules.
30. **Mr. Maradiaga** (Honduras) said that the use of the word “irrevocable” might have problematic implications and should therefore be avoided.
31. **Mr. Loh** (Singapore) said that the proposed heading “Irrevocable offer of application” might conflict with draft

article 4 (1), which provided that a reservation could be made by a Party at any time.

32. **Ms. Viscasillas** (Spain) said that while she appreciated the concern expressed by the representative of Singapore, an offer would be irrevocable provided that the conditions established by the convention were not modified; in the event of their modification, the convention would establish the point in time at which such changes would come into effect or cease to have effect. However, in order to avoid complication of the issue, she proposed that the heading simply read “Offer of application”.

33. **Mr. Limparangsri** (Thailand), supported by **Mr. Schöfisch** (Germany), endorsed the view that an offer could be revoked on the basis of a reservation and was therefore not necessarily irrevocable. Moreover, the use of the word “unilateral” in the heading provided a clear contrast to the heading of paragraph 1, namely “Bilateral or multilateral application”. His delegation therefore supported retention of the heading as drafted.

34. **The Chair** said that the original intention of the wording of the heading as drafted had been precisely to convey that contrast.

35. **Mr. Räftegård** (Observer for Sweden) said that it might be helpful to clarify the difference between an offer made prior to arbitration and an offer made during arbitration.

36. **Mr. Spelliscy** (Canada), endorsing the view that it would be helpful to retain the word “unilateral” in order to preserve the distinction between unilateral and bilateral or multilateral application of the Rules on Transparency, said that it might be helpful to amend the heading to read “Offer of unilateral application” in order to clarify that it was the application, rather than the offer, that was unilateral.

37. **Mr. Jacquet** (France) said that while the headings of paragraphs 1 and 2 did not fully reflect the content of those paragraphs, i.e., the fact that paragraph 1 referred to bilateral or multilateral application of the Rules on Transparency on the basis of a treaty while paragraph 2 referred to application of the Rules on the basis of an agreement between the respondent and the claimant arising from a unilateral offer by the respondent, his delegation supported the retention of those headings as drafted, since the distinction between unilateral and bilateral or multilateral should be preserved and an offer under paragraph 2 should be described in general terms.

38. **Mr. Hamamoto** (Japan) expressed support for the retention of the headings as drafted.

39. **Mr. Schneider** (Switzerland), referring to the heading of paragraph 2, endorsed the view that the word “unilateral” should qualify “application” rather than “offer”. However, the wording “unilateral application” did not convey clearly that the consent of the claimant to such application was required.

40. **The Chair**, echoing that concern, said that it was doubtful that the heading as it stood would not be readily understood by practitioners. However, in order to address the

concern raised, the Secretariat proposed amendment of the heading to read “Application pursuant to an offer by the respondent”. He suggested that the meeting be suspended briefly in order for delegates to consult informally on the heading.

*The meeting was suspended at 12.15 p.m. and resumed at 12.30 p.m.*

41. **The Chair** said that the consultations had resulted in consensus that the paragraph headings of draft article 2 should not be amended. He took it that the Commission wished to approve those paragraph headings as drafted.

42. *It was so decided.*

43. **The Chair** further took it that the Commission wished to approve draft article 2, paragraph 2, as amended by the deletion of the phrase in square brackets “[, as they may be revised from time to time.]”.

44. *It was so agreed.*

#### *Paragraph 3*

45. **Mr. Spelliscy** (Canada) proposed that, since the draft paragraph referred to an arbitral tribunal for the first time and no such reference was made elsewhere in the draft text of the convention, including in the preceding paragraphs of draft article 2, the paragraph be amended to read “Where the UNCITRAL Rules on Transparency apply pursuant to paragraph 1 or 2, the most recent version of those Rules as to which the respondent has not made a reservation pursuant to article 3(2) shall apply.”

46. **The Chair** said he took it that the Commission wished to accept that proposal.

47. *It was so decided.*

48. *Paragraph 3, as amended, was approved.*

#### *Paragraph 4*

49. *Paragraph 4 was approved.*

#### *Paragraph 5*

50. **The Chair** drew attention to a proposal by the secretariat (A/CN.9/812, paragraph 26) to delete the words “[or non-application]” on the understanding that alteration of the application of the Rules on Transparency would include their non-application.

51. **Mr. Loh** (Singapore), supported by **Mr. Apter** (Israel), said that while his delegation endorsed that proposal, the words “alter the application” suggested that the provision referred only to cases in which the Rules on Transparency already applied, and did not preclude the possibility that a claimant might seek to apply the Rules for the first time. He therefore proposed the insertion of the words “apply or” before the words “alter the application”. The paragraph would thus read “The Parties to this Convention agree that a claimant may not invoke a most-favoured-nation provision to seek to apply or alter the application under this Convention of the UNCITRAL Rules on Transparency”.

52. **The Chair** wondered whether the proposed wording would make it clear that the words “alter the application” in effect meant “disapply”, and whether it would place greater emphasis on application than on non-application.

53. **Mr. Von Walter** (Observer for the European Union), expressing support for the deletion of the words “[or non-application]”, said that it was his delegation’s understanding that the words “to seek to alter the application” encompassed both application and avoidance of application of the Rules. He was not convinced that the proposed wording “apply or alter the application” offered greater clarity, particularly since, as had been pointed out, that formulation appeared to place emphasis on application and thus create uncertainty as to whether the words “alter the application” encompassed non-application.

54. **Mr. Marani** (Argentina), supported by **Ms. Escobar Pacas** (El Salvador), said that his delegation was in favour of retaining the words “or non-application” because that formulation left no doubt as to the intention of the provision, whereas the proposed wording “apply or alter the application” might cause confusion.

55. **Mr. Schnabel** (United States of America), endorsing that view, said that the wording “application or non-application” was the result of earlier discussions during which it had been agreed that there should be no scope for interpretation of the provision in such a way as to affect the understanding of most-favoured-nation clauses.

56. **Mr. Ruffer** (Observer for the Czech Republic) said that while he supported the views expressed by the representative of the European Union, if the majority of delegations preferred to retain the words “or non-application”, he proposed modification of the wording to read “to seek to alter the application or seek non-application under this Convention of the UNCITRAL Rules on Transparency” for the sake of clarity, given that it was difficult to understand what was meant by the alteration of non-application.

57. **Mr. Sánchez Medina** (Colombia), expressing support for the comments made by the representative of Argentina, said that if the proposed wording “to seek to apply or alter the application” was adopted, there was a risk that a claimant could invoke a most-favoured-nation clause in order to avoid application of the Rules on Transparency.

58. **Mr. Loh** (Singapore) said that, in view of the comments made, his delegation was prepared to withdraw its proposal and support the original proposal to include the words “or non-application”.

59. **Mr. Apter** (Israel) said that his delegation supported the consensus that the idea of “non-application” should be conveyed by the provision.

60. **Mr. Cachapuz de Medeiros** (Brazil) wondered whether a most-favoured-nation provision should be included in the convention at all, given that such a provision appeared inappropriate in the context of transparency in arbitration and would not apply to an investment treaty in any case.

61. **The Chair** recalled that the provision had been included in order to clarify that a claimant could not avoid application of the Rules on Transparency by invoking a most-favoured-nation clause to claim that the non-transparent dispute resolution provisions of another treaty were more favourable to it, nor could a claimant invoke such a clause to make the Rules on Transparency applicable to its arbitration in circumstances where the Rules would not otherwise apply. The intention was also to prevent the use of most-favoured-nation clauses to circumvent reservations made in respect of the Rules. The provision did not express a position regarding the interpretation or effect of most-favoured-nation clauses as a matter of public international law.

62. **Mr. Asawawattanaporn** (Thailand) said that, in view of the two scenarios described with regard to most-favoured-nation clauses, his delegation supported the retention of the words “or non-application”.

63. **The Chair** proposed that, in order to address the concerns raised, the paragraph be amended to read “The Parties to this Convention agree that a claimant may not invoke a most-favoured-nation provision to seek to apply, or avoid the application, under this Convention of the UNCITRAL Rules on Transparency.” Minor redrafting would be needed in order to resolve the problem presented by the position of the word “of”, i.e. by the wording “seek to apply [...] of”.

64. **Mr. Maradiaga** (Honduras) and **Mr. Spelliscy** (Canada) expressed support for that proposal.

65. **The Chair** said that the final wording of paragraph 5 as amended would be submitted to the Commission for approval at its next meeting.

#### *Draft article 3 — Reservations*

66. **The Chair**, referring to draft article 3 as a whole, said he took it that the Commission wished to endorse the unanimous agreement of the Working Group that it would be unacceptable for a party to accede to the convention and then carve out the entire content of the convention by making reservations.

67. *It was so agreed.*

#### *Paragraph 1*

68. **Mr. Spelliscy** (Canada) said that subparagraph 1(a) as drafted could give rise to situations in which one party to a treaty made a reservation in respect of that treaty but the other party to that treaty, also party to the convention, did not. Furthermore, he understood it to mean that if such a declaration was made, the treaty would not be subject to article 2(2), i.e., there might be confusion as to whether a unilateral offer of application of the Rules on Transparency could be made. He therefore proposed, for the sake of clarity, that the words “to which it is a party” be inserted after the words “specific investment treaty” and that the words “in cases where it is the respondent in an arbitration brought under that treaty” be inserted at the end of the subparagraph. He also proposed that the words “date that investment treaty was concluded” be amended to read “date that investment

treaty was signed by the Party” in view of the possibility that, in the case of a multilateral investment treaty, a party might sign that treaty after the treaty was concluded, in which case the date of signature was more relevant to the party in question and would facilitate identification of the treaty.

69. **The Chair** said that the subparagraph as amended would thus read:

“A Party may declare that:

(a) a specific investment treaty to which it is a party, identified by title, name of contracting parties to that investment treaty, and date that investment treaty was signed by the Party making the reservation, shall not be subject to this Convention in cases where it is the respondent in an arbitration brought under that treaty;”

70. **Ms. Escobar Pacas** (El Salvador) proposed that the chapeau of the subparagraph be amended to read “A Party may make the following reservations:” in view of the difference, from a legal perspective, between a declaration and a reservation.

71. **Mr. Apter** (Israel) said that the wording of the chapeau should remain as drafted since the declaration referred to was the mechanism through which a reservation would be made, and the title of article 3 in any case made the purpose of declarations under that article clear.

72. **The Chair** said that, if he heard no further comments, he would take it that the Commission wished to retain the chapeau as drafted.

73. *It was so agreed.*

74. **The Chair** suggested that the Commission consider the proposal made by the delegation of Canada at its next meeting.

75. *It was so decided.*

*The meeting rose at 1.10 p.m.*

**Summary record of the 985th meeting (closed)**  
**Held at Headquarters, New York, on Monday, 7 July 2014, at 3 p.m.**

[A/CN.9/SR.985]

*Chairperson:* Mr. Salim Moollan (Vice-Chair) (Mauritius).

*The meeting was called to order at 3.05 p.m.*

**Consideration of issues in the area of arbitration and conciliation** (*continued*)

**(a) Finalization and approval of a draft convention on transparency in treaty-based investor-State arbitration** (*continued*) (A/CN.9/794, 799, 812 and 813 and Add.1)

*Draft article 2 — Application of the UNCITRAL Rules on Transparency* (*continued*)

*Paragraph 5* (*continued*)

1. **Mr. Spelliscy** (Canada) said that the minor drafting issue with regard to paragraph 5 had been resolved; the paragraph now read:

“The Parties to this Convention agree that a claimant may not invoke a most-favoured nation provision to seek to apply, or avoid the application of, the UNCITRAL Rules on Transparency under this Convention.”

2. **Mr. Räftegård** (Observer for Sweden) said that, while his delegation had no objection to the proposed wording, he wondered whether the provision should address the application of different versions of the Rules on Transparency, given that a State might seek to apply different versions of the Rules in respect of different States if one or more of those States had most-favoured-nation status.

3. **Mr. Schnabel** (United States of America) said that he doubted such a situation could arise given that any reservation made in respect of a new version of the Rules would apply to all investment treaties concluded by the party that had made the reservation, including existing treaties.

4. **Ms. Viscasillas** (Spain) proposed that the words “in an investment treaty” be added after the words “a most favoured nation provision” in order to bring the wording of the paragraph into line with the paragraph heading.

5. **The Chair** asked whether there was any support for that proposal and, in the absence of comments, said he took it that the Commission wished not to amend paragraph 5 further but to approve the text of the paragraph as read out by the delegation of Canada.

6. *It was so decided.*

7. *Draft article 2 as a whole, as amended, was approved.*

*Draft article 3 — Reservations* (*continued*)

*Paragraph 1* (*continued*)

8. **Mr. Spelliscy** (Canada) said that while consultations regarding his delegation’s proposals concerning subparagraph 1 (a) were ongoing, there appeared to be agreement that the reference in that subparagraph to the date on which an investment treaty was concluded could be deleted, since the title of the treaty and the names of the contracting parties were sufficient in order to identify that treaty.

9. **Mr. Apter** (Israel) said that, while his delegation had no objection to that proposal, the subparagraph should perhaps provide in some way for cases in which a bilateral investment treaty had been amended and there was therefore a need to identify the version of that treaty to which a reservation related.

10. **Mr. Spelliscy** (Canada) said that he could not envisage any situation in which a State would wish or need to make a reservation in respect of only one version of a treaty, or in which an amended treaty would not simply supersede the original treaty; in any case, it was unlikely that the treaty provisions relating to investor-State dispute resolution would be amended.

11. **Mr. Schöfisch** (Germany) said that there would be nothing to prevent States from identifying a treaty in ways other than those provided for in subparagraph 1 (a) if they considered such additional means of identification necessary.

12. **Mr. Apter** (Israel) said that, in the light of the comments made, and on the understanding that the provision would apply to any successive treaty, his delegation was willing to accept the proposal made by the delegation of Canada.

13. **The Chair** suggested that the Commission resume its consideration of paragraph 1 following further informal consultations.

14. *It was so agreed.*

*Paragraph 2*

15. **Mr. Von Walter** (Observer for the European Union), referring to the written comments submitted by the European Union (A/CN.9/813/Add.1), said that the proposed amendment to paragraph 2, namely to insert the words “in investor-State arbitration in which it is a respondent” at the end of the paragraph for the sake of consistency with subparagraphs 1 (b) and (c), might not be necessary given that the substance of that formulation was captured by the approved text of article 2(3). Discussion of



the proposed amendment could be postponed pending a decision on paragraph 1 in the light of the proposals made by the delegation of Canada with respect to that paragraph.

16. **Mr. Apter** (Israel) sought clarification as to whether the secretariat would notify all parties to the convention, as well as States that planned to accede to the convention, of any amendment to the Rules on Transparency. If that were the case, it should be reflected in the *Travaux Préparatoires*.

17. **The Chair** confirmed that it was the practice of the Commission to notify not only its member States but all Member States of the United Nations of the outcomes of its work.

18. **Mr. Mirza** (Pakistan) said that the six-month period within which a State could declare that it would not apply a revised version of the Rules on Transparency should start from the date on which a State was notified of the amendment rather than the date on which the revised version was adopted, given that there might be a delay between adoption of the amendment and notification of States parties.

19. **The Chair** said that such a delay was unlikely given that the adoption or amendment by the Commission of any UNCITRAL instrument was immediately communicated to the member States by means of a note verbale; moreover, since any amendment to an UNCITRAL instrument was likely to be the product of at least a year of work, the member States would be well aware of the status of that work. A reference in the convention to the date of notification of an amendment might create uncertainty.

20. For the sake of drafting consistency, the secretariat proposed that the words “amendment to” be replaced with the words “a revision of”, and the words “such amendment” with “such revision”, in view of the words “revised version of the Rules” at the end of the paragraph. He took it that the Commission wished to approve the paragraph as thus amended.

21. *Paragraph 2, as amended, was approved.*

#### *Paragraph 3*

22. **Ms. Pólit** (Ecuador) wondered whether paragraph 3 restricted the right of States to make a reservation.

23. **The Chair** recalled that the Working Group, at its fifty-ninth and sixtieth sessions, had reached consensus that the only reservations permitted ought to be those enumerated in the convention. If there were no further comments, he would take it that the Commission wished to approve the text of paragraph 3.

24. *It was so decided.*

#### *Draft article 4 — Formulation of reservations*

25. **The Chair** drew attention to a proposal submitted by Japan, contained in document A/CN.9/813, to introduce a new paragraph following paragraph 3 of draft article 4, to read “Reservations made at the time of ratification,

acceptance or approval of this Convention or accession thereto shall take effect simultaneously with the entry into force of this Convention in respect of the Party concerned.”

26. *The proposed text was approved.*

#### *Paragraph 1*

27. *Paragraph 1 was approved.*

#### *Paragraphs 2 and 3*

28. **Ms. Escobar Pacas** (El Salvador) proposed that paragraph 2 appear later in the article, as it suggested that confirmations of reservations had been referred to previously, whereas in fact confirmation was explained in paragraph 3.

29. **The Chair** proposed that the order of paragraphs 2 and 3 be inverted in order to reflect that logical sequence.

30. *It was so decided.*

31. *The text of paragraphs 2 and 3 was approved.*

#### *Paragraph 4*

32. **Mr. Baykitch** (Australia) said that the words “that Party” were confusing, as the paragraph made no previous reference to a Party. He therefore proposed the insertion of the words “made by a Party” following the words “a reservation” in the second line, so that the second part of the paragraph would read “a reservation made by a Party of which the depositary receives formal notification after the entry into force of the Convention for that Party shall take effect 12 months after the date of its receipt by the depositary.”

33. *It was so agreed.*

34. *Paragraph 4, as amended, was approved.*

#### *Paragraph 5*

35. *Paragraph 5 was approved.*

#### *Paragraph 6*

36. **Mr. Von Walter** (Observer for the European Union), drawing attention to the written proposal of the European Union contained in document A/CN.9/813/Add.1, said that it was his delegation’s understanding that the words “with the effect of making such a withdrawal” were intended to cover withdrawals or modifications of reservations which expanded the scope of application of the UNCITRAL Rules on Transparency. However, his delegation sought clarification as to whether, if a Party made a reservation under article 3(1)(a) in respect of a number of treaties, that Party would effectively have made separate reservations in respect of each of those treaties. That might obviate the need to refer to the modification of reservations, since such reservations could only be made or withdrawn. Conversely, if a single reservation covered more than one specific treaty or excluded more than one set of arbitration rules, that reservation could be modified with the effect of

increasing the scope of application of the Rules on Transparency. He wondered whether the text of the paragraph as drafted addressed those scenarios sufficiently clearly.

37. **The Chair** said that, in view of the fact that both scenarios were possible, it might be advisable to retain the wording of the paragraph as drafted in order to provide for both possibilities, namely withdrawal and modification of a reservation.

38. **Mr. Apter** (Israel) said that while either interpretation of the provision was possible, the written proposal submitted by Israel with respect to the withdrawal of reservations (A/CN.9/813) was based on the understanding that a reservation referring to more than one treaty or set of arbitration rules or procedures would be regarded as a single reservation, since separate reservations within a single instrument might be burdensome. The proposal was simply intended to lend the provision greater clarity by limiting the references to modification. The first sentence would thus read “If, after this Convention has entered into force for a Party, that Party withdraws a reservation, such withdrawal shall take effect upon receipt of the notification by the depositary”, and a new second sentence would be added, to read “The foregoing shall also apply to a modification of an existing reservation to this Convention which in effect results in such a withdrawal.”

39. **Mr. Schnabel** (United States of America), supported by **Mr. Taylor** (United Kingdom) and **Mr. Spelliscy** (Canada), said that his delegation shared the view that the wording of paragraph 6 as drafted was ambiguous and would prefer to retain the original wording as developed by the Working Group and set out in paragraph 37 of document A/CN.9/812 (“If, after this Convention has entered into force for a Party, that Party: (a) withdraws or modifies a reservation made under article 3(1) so as to apply article 2(1) to investor-State arbitration under an additional investment treaty or to investor-State arbitration under additional arbitral rules or procedures; (b) withdraws a reservation made under article 3(2); such withdrawal shall take effect upon receipt of the notification by the depositary.”). That original text, while longer, offered a more precise explanation of the changes that would enable a withdrawal of a reservation to take effect and would therefore prevent any future difficulties in interpreting the provision.

40. **The Chair** recalled that the rationale for the new wording proposed by the secretariat was that the text as originally drafted would not be clear to practitioners, particularly the references to “an additional investment treaty” and “additional arbitral rules or procedures”.

41. **Mr. Schöfisch** (Germany), referring to the proposal made by the representative of Israel, expressed concern that the wording of the proposed additional sentence implied that modification resulted in withdrawal and consequently did not provide for situations in which the modification of a reservation did not result in withdrawal.

42. **Mr. Schneider** (Switzerland) and **Mr. Von Walter** (Observer for the European Union) concurred that the proposed reference to modification “with the effect of making such a withdrawal” was misleading; a modification that had the effect of withdrawal was surely a withdrawal, whereas the modification of a reservation to include or exclude a specific investment treaty or a specific set of arbitration rules or procedures did not constitute a withdrawal but rather a reduction in the scope of the reservation. The proposed wording did not reflect that distinction.

43. **Mr. Mirza** (Pakistan) said that the wording proposed by the secretariat (A/CN.9/812) clarified the effect of the provision and should therefore be retained.

44. **Mr. Apter** (Israel) said that, in the light of the comments made, his delegation would have no objection to the retention of the wording originally proposed by the Working Group.

45. **Mr. Jacquet** (France) said that in seeking to clarify the meaning of modification of a reservation, it should be borne in mind that paragraph 5 of the draft article also referred to modifications and withdrawals and therefore posed the same difficulties. A possible solution would be to delete paragraph 6 and to add the words “and shall take effect upon receipt of the notification by the depositary” to the end of paragraph 5.

46. **The Chair** said that that possibility raised the question of whether the Commission wished to retain the distinction between modifications and withdrawals that provided for greater transparency, which would take effect upon receipt of the notification by the depositary, and modifications and withdrawals that reduced transparency, which would take effect 12 months after the date of receipt of the notification by the depositary, as agreed upon by the Working Group and reflected in paragraph 7. He took it that the Commission wished to affirm that agreement.

47. *It was so decided.*

48. **Ms. Escobar Pacas** (Ecuador), pointing out that paragraph 7 referred only to modification of a reservation, wondered whether that paragraph should refer also to withdrawal of a reservation.

49. **The Chair** said that no reference to withdrawal was needed, since withdrawal would automatically result in greater transparency. However, the drafting of paragraph 7 could also be reviewed in order to ensure that that was clear.

50. On the basis of the support expressed for the retention of the wording originally proposed by the Working Group (A/CN.9/812 paragraph 37), he suggested that delegations continue to consider possible ways of clarifying the provision during informal consultations, bearing in mind the concerns raised by the Working Group at the time of drafting that original text.

51. *It was so agreed.*

*Draft article 5 — Application to investor-State arbitrations*

52. **Mr. Von Walter** (Observer for the European Union) said that the draft article should reflect more precisely the intention of the words “in respect of each Party”, namely to clarify that the article referred to the time when the convention would enter into force in respect of the Party in question, and not when the convention would enter into force generally, and that the article applied not to each Party to the convention but only to a Party that was also a respondent or the State of a claimant in the investor-State arbitration concerned. He therefore proposed that the words “concerned with the treaty” be inserted after the words “in respect of each Party”.

53. **The Chair** suggested that simply the word “concerned” be added at the end of the paragraph.

54. *It was so decided.*

55. **Mr. Spelliscy** (Canada) proposed that, for the sake of consistency with other provisions of the draft convention, the word “shall” be inserted before the words “apply only to investor-State arbitrations” and, for the sake of consistency in tense usage, that the words “have been commenced” be replaced with “are commenced”.

56. *It was so agreed.*

57. *Draft article 5, as amended, was approved.*

*Draft article 6 — Depositary*

58. *Draft article 6 was approved.*

*The meeting was suspended at 4.25 p.m. and resumed at 5.10 p.m.*

*Draft article 3 (continued)*

*Paragraph 1 (continued)*

59. **Mr. Spelliscy** (Canada) said that agreement had been reached in informal consultations that the draft text of paragraph 1 (a) should read “It shall not apply this Convention to investor-State arbitrations under a specific investment treaty, identified by title and name of contracting parties to that investment treaty.” It was further proposed that the word “will” in paragraph 2 be replaced with the word “shall” for the sake of consistency with other provisions of the draft convention.

60. **The Chair** took it that the Commission wished to accept the proposal made with regard to paragraph 2 and suggested that the Commission take a decision on the proposal concerning paragraph 1 (a) at its next meeting.

61. *It was so decided.*

*Draft article 4 (continued)*

*Paragraph 6 (continued)*

62. **Mr. Schnabel** (United States of America) said that the outcome of informal consultations on the draft provision was a proposal to amend paragraph 6 to read:

“If, after this Convention has entered into force for a Party, that Party withdraws a reservation under article 3(1)(a) or 3(1)(b) with respect to a specific investment treaty or a specific set of arbitration rules or procedures, or a reservation under article 3(1)(c) or 3(2), such withdrawal shall take effect upon receipt of the notification by the depositary.”

63. The proposed wording resolved the difficulties posed by the references in the original text of the provision to “an additional investment treaty” and “additional arbitral rules or procedures” and, since it obviated the need for reference to modifications, the words “or modify” could be removed from paragraph 5 of the draft article and paragraph 7 could be deleted, as each treaty or set of arbitration rules or procedures excluded by a Party from the scope of article 3(1) would be treated as a separate reservation. During the consultations there had been discussion of whether explicit language was needed in the convention or an explanation in the *Travaux Préparatoires* to clarify that understanding.

64. **The Chair** suggested that the Commission take a decision on the proposed wording at its next meeting.

65. *It was so decided.*

*Draft article 7 — Signature, ratification, acceptance, approval, accession*

*Paragraph 1*

66. **The Chair**, drawing attention to an offer by the Government of Mauritius to host a ceremony for the signing of the convention, tentatively scheduled for 24 March 2015, suggested that the Commission defer its consideration of paragraph 1 of draft article 7 until that proposal was formally introduced by a member of the delegation of Mauritius at the Commission’s next meeting.

67. *It was so agreed.*

*Paragraphs 2 to 4*

68. *Paragraphs 2 to 4 were approved.*

*Draft article 8 — Participation by regional economic integration organizations*

*Paragraph 1*

69. **Mr. Spelliscy** (Canada) proposed that the words “identified by title, name of contracting parties to that investment treaty, and date that investment treaty was concluded” be amended to read “identified by title and name of contracting parties to that investment treaty”, thus eliminating the reference to the date of conclusion of the treaty, to ensure consistency with the proposed amended text of draft article 3(1)(a).

70. **Ms. Viscasillas** (Spain) said that the reference to the date of conclusion of the investment treaty was important in view of the requirement that a regional

economic integration organization be party to an investment treaty concluded prior to 1 April 2014 in order for the convention to apply to that treaty. Draft article 8 did not need to be aligned with draft article 3(1)(a) since the situations provided for in those articles were not analogous.

71. **The Chair** wondered whether draft article 8 should be amended to clarify that requirement, although a regional economic integration organization would in any case be unable to apply the convention to an investment treaty concluded after 1 April 2014.

72. **Mr. Von Walter** (Observer for the European Union) said that the requirement was already clearly expressed in article 7(1) and need not be repeated in draft article 8.

73. **The Chair** said he took it that the Commission wished to accept the proposal made by the representative of Canada.

74. *It was so decided.*

75. *Paragraph 1, as amended, was approved.*

#### *Paragraph 2*

76. *Paragraph 2 was approved.*

#### *Draft article 9 — Entry into force*

##### *Paragraph 1*

77. **Ms. Ngatsha Sichone** (Zambia) proposed that the words “enters into force” be replaced with the words “shall enter into force”.

78. *It was so decided.*

79. *Paragraph 1, as amended, was approved.*

##### *Paragraph 2*

80. *Paragraph 2 was approved.*

#### *Draft article 10 — Amendment*

##### *Paragraph 1*

81. *Paragraph 1 was approved.*

##### *Paragraph 2*

82. **Mr. Spelliscy** (Canada) proposed that the first sentence of paragraph 2 (“The conference of Parties shall make every effort to achieve consensus on each amendment”) be modified to read “The Parties shall make every effort to achieve consensus at the conference on each amendment”.

83. **Mr. Hamamoto** (Japan) said that the wording of that sentence was based on the language used in other United Nations instruments and should therefore be retained.

84. **Mr. Spelliscy** (Canada) further proposed that the phrases “have been exhausted” and “has been reached”

be replaced with the phrases “are exhausted” and “is reached”, respectively.

85. *It was so decided.*

86. *Paragraph 2, as amended, was approved.*

##### *Paragraph 3*

87. *Paragraph 3 was approved.*

##### *Paragraph 4*

88. **Mr. Apter** (Israel) proposed that the phrase “those Parties which have expressed consent to be bound by it” be replaced with wording along the lines of “those Parties which have deposited such an instrument” in order to clarify how Parties’ consent might be expressed.

89. **Mr. Hamamoto** (Japan) said that the draft text was based on the language used in the Vienna Convention on the Law of Treaties, which addressed means of expressing such consent.

90. *Paragraph 4 was approved.*

##### *Paragraphs 5 and 6*

91. *Paragraphs 5 and 6 were approved.*

#### *Draft article 11 — Denunciation of this Convention*

##### *Paragraph 1*

92. **Ms. Viscasillas** (Spain), drawing attention to the fact that paragraph 1 of the draft article referred to notification in writing whereas draft article 4 referred to formal notification to the depositary, asked whether that distinction was deliberate. If not, the wording of the two draft articles should be made consistent.

93. **The Chair** proposed that the words “notification in writing” be replaced with the words “formal notification” in order to resolve that inconsistency.

94. **Ms. Pólit** (Ecuador) said that notifications to the depositary should be in writing.

95. **The Chair** said that a notification to the depositary was understood to be a notification in writing. That understanding could be reflected in the *Travaux Préparatoires*. He took it that the Commission wished to accept his proposal.

96. *It was so decided.*

97. **Mr. Muiruri Ngugi** (Kenya) pointed out that the text of the draft convention was inconsistent with respect to references to the depositary; “the Secretary-General”, “the Secretary-General of the United Nations”, “the depositary” and (in draft articles 6 and 8) “the depositary” were all used. That inconsistency should be resolved.

98. **The Chair** said that the instances of “depositary” would be corrected. In draft article 10, the Secretary-General was not referred to in his capacity as depositary

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since that provision conferred on the Secretary-General a specific role with respect to the amendment procedure.

99. *Paragraph 1, as amended, was approved.*

*Paragraph 2*

100. *Paragraph 2 was approved.*

*Final provisions*

101. *The final provisions of the draft convention were approved.*

*The meeting rose at 6 p.m.*

**Summary record of the 986th meeting (closed)**  
**Held at Headquarters, New York, on Tuesday, 8 July 2014, at 10 a.m.**

[A/CN.9/SR.986]

*Chairperson:* Mr. Salim Moollan (Vice-Chair) (Mauritius).

*The meeting was called to order at 10.10 a.m.*

## **Coordination and cooperation**

### **(c) Reports of other international organizations**

1. **Mr. Sorieul** (Secretary of the Commission) said that the Commission would resume the consideration of its agenda following a statement by Ms. Irene Khan, Director-General of the International Development Law Organization (IDLO), which promoted the rule of law through training and technical assistance and whose work covered, *inter alia*, trade law as an essential tool for development in general. Her statement would therefore touch on a number of the items on the Commission's current agenda, including transparency in treaty-based investor-State arbitration, coordination and cooperation and the role of UNCITRAL in promoting the rule of law at the national and international levels.

2. **Ms. Khan** (Observer for the International Development Law Organization), welcoming the Commission's work in the area of commercial law reform and reiterating the support of IDLO for those efforts, said that the rule of law was of key importance in advancing good governance and sustainable development, especially from the perspective of transparency, accountability and access to information. It required the accountability of all individuals and both private and public entities and institutions to publically promulgated, equally enforced, independently adjudicated laws that were consistent with international norms and standards, and not only provided certainty and predictability of the law, which was key to economic development, but also promoted justice and equality through respect for human rights. The discussions of United Nations bodies on the post-2015 development agenda and sustainable development goals had stressed the significance of the rule of law as an enabler as well as an outcome of sustainable development. IDLO was playing an active role in those discussions, drawing on its experience in countries around the world to demonstrate that the rule of law was indispensable to all three dimensions of sustainable development: economic, social and environmental.

3. Transparency and accountability underpinned the rule of law, helping to build accountable institutions that ensured sustainable resource management and guided responsible and equitable investment. From the perspective of businesses as well as citizens, they created confidence in institutions, secured compliance with the law and strengthened both democracy and development by empowering individuals and communities to assert their rights. Lack of transparency in the development of trade and investment policies and laws and in related dispute

mechanisms, and opaque and uneven implementation and enforcement, diminished both public and investor trust and confidence and increased the potential for mismanagement of public funds, corruption and bribery, thus affecting economic development and growth. IDLO experience had shown that the source of many conflicts and failed development ventures lay in lack of transparency, accountability, information and public engagement.

4. Investor-State arbitration measures were an important alternative means of resolving disputes outside of national jurisdiction and assisted in building investor confidence in countries with certain levels of political and economic risk. However, many developing countries were withdrawing from bilateral investment treaties and regional trade agreements, partly because of a perceived lack of transparency and accountability in investor-State dispute settlement procedures. Investor-State disputes often concerned large sums with important implications for the State budget, and could influence decisions about critical natural resources. If resolved through arbitral proceedings conducted behind closed doors, such disputes could call into question domestic health, safety and environmental regulations, be perceived as inhibiting the ability of governments to pass legislation addressing matters of public interest, such as labour rights or human rights, or even lead to the violation of international law.

5. Ensuring that investor-State decision-making was transparent and accessible to all citizens was crucial to democratic public debate and stakeholder engagement, which guided and shaped any domestic law reform process. Transparency was not easy to achieve; it required resources, capacity and balancing of the competing interests of the State, investors and the public. In that respect, the work of UNCITRAL in developing its transparency standards and transparency registry was of great importance. From the investment perspective, transparency and accountability under the rule of law helped to address concerns regarding the confidentiality of certain aspects of contracts, licences and operations. Information from the UNCITRAL transparency registry would contribute to the development of acceptable standards and, through inclusive debate, help to build good practices with regard to exceptions to disclosure.

6. The experience of IDLO as an organization that worked on the ground, helping governments to build their capacity and helping civil society to achieve legal empowerment, showed that transparent laws and regulations that were fairly administered by open, responsive and accountable institutions and mechanisms could transform societies, especially when such measures were accompanied by the full participation and

empowerment of citizens. Bringing the rule of law closer to the people was key to promoting sustainable and inclusive development, and to responsible investment.

### Consideration of issues in the area of arbitration and conciliation *(continued)*

#### (a) Finalization and approval of a draft convention on transparency in treaty-based investor-State arbitration *(continued)* (A/CN.9/794, 799, 812 and 813 and Add.1)

*Draft article 7 (continued)*

*Paragraph 1 (continued)*

7. **Mr. Reetoo** (Mauritius) said that he wished to formally introduce the offer of the Government of Mauritius to organize and host the signing ceremony for the convention on transparency in treaty-based investor-State arbitration. Mauritius had taken a leading role in the drafting of both the convention and the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, which were an effective solution to calls for changes to the UNCITRAL Arbitration Rules in that they recognized differences between the long-established field of international commercial arbitration and the rapidly developing field of investment arbitration while ensuring that the UNCITRAL Arbitration Rules remained a general standard applicable to all forms of international arbitration. Both the Rules on Transparency and the convention also addressed the concerns that were increasingly raised with regard to the legitimacy of investment arbitration. It was important that, when disputes raised issues that were of direct interest to a State and its citizens and that could potentially have a significant impact on public funds, justice not only be done but be seen to be done by means of a fully transparent process. By establishing the Rules on Transparency with a view to their application to future investment treaties and the convention as a mechanism for the application of the Rules to existing treaties, the Commission had struck the right balance, recognizing that States' policies in that area were still evolving. The comprehensiveness and rigorosity of the Commission's transparency standards would contribute to their broad adoption in years to come.

8. The hosting of the signing ceremony for the convention would be a fitting way for Mauritius to express its gratitude to the Commission for its invaluable and continuing assistance over the past eight years. In 2006, Mauritius had decided to address the concern that, while the formal discourse on international arbitration emphasized its inclusiveness, there was a perception in the developing world that international arbitration was based predominantly on the European or United States models. Consequently, international arbitration might be perceived as a foreign process imposed from abroad and an unwanted but inevitable corollary of trade and investment flows. In order to address that concern, it was important to ensure that the developing world had its say in the arbitral process and its development and that international arbitration

progressively became an integral part of the legal culture of developing countries. Accordingly, Mauritius had set out to create a platform by means of which capacity in international dispute resolution could be built among arbitrators and lawyers throughout Africa, a task that it would not have been able to achieve without the assistance of UNCITRAL. Owing in large part to that assistance, Mauritius had adopted a new act on international arbitration based on the UNCITRAL Model Law on International Commercial Arbitration. It had also signed a host country agreement with the Permanent Court of Arbitration, the first such agreement in the Court's history, and had hosted numerous high-level events under the aegis of inter alia, UNCITRAL, the International Centre for Settlement of Investment Disputes, the International Chamber of Commerce, the London Court of International Arbitration and the International Council for Commercial Arbitration. Moreover, it would be hosting the International Council of Commercial Arbitration congress in 2016. It had established a state-of-the-art, independent arbitration centre in cooperation with the London Court of International Arbitration and was soon to open hearing facilities. Those developments bore testimony to the fact that the work conducted by the Commission had very real and practical implications for United Nations Member States. The transparency standards developed by the Commission would undoubtedly have similar practical implications in the future.

9. The Government of Mauritius proposed that the transparency convention be designated the Mauritius Convention on Transparency in Investor-State Arbitration, and that the signing ceremony be held on 17 March 2015. The Government would work closely with the United Nations Secretariat to define and implement a suitable programme. A high-level seminar would be held under the auspices of UNCITRAL within the broader framework of the United Nations rule of law agenda on the day preceding the signing. He expressed the hope that the Commission would consider the proposal favourably.

10. **Mr. Jacquet** (France), welcoming the proposal, said that the fact that Working Group II had been chaired by a representative of Mauritius was a further link between that country and the most recent work carried out by UNCITRAL in the area of international arbitration. Mauritius had demonstrated keen interest in the issue of transparency as a major tool in increasing the legitimacy of arbitration between States and foreign investors. In order that the convention reflect the connection between it and Mauritius, he proposed that article 7, paragraph 1, read: "This Convention shall be open for signature at Port Louis, Mauritius, by all States and regional economic integration organizations on 17 March 2015 and thereafter at the United Nations Headquarters in New York until [...]". The date had been left blank, but presumably a period of one year for signature would be appropriate.

11. **The Chair** proposed that that text be amended slightly, incorporating the wording of the draft article, to read: "This Convention is open for signature in Port Louis,

Mauritius, by all States and regional economic integration organizations that are constituted by States and are a contracting party to an investment treaty on 17 March 2015, and thereafter at the United Nations Headquarters in New York.” There would thus be no reference to an end date. Since the reference to the date of opening for signature would have to be moved for the sake of clarity, the paragraph would be redrafted with the assistance of the secretariat.

12. **Mr. Mirza** (Pakistan), **Mr. Schnabel** (United States of America), **Mr. Schöfisch** (Germany), **Mr. Apter** (Israel), **Mr. Schneider** (Switzerland), **Mr. Maradiaga** (Honduras), **Mr. Mugasha** (Uganda), **Mr. Asawattaporn** (Thailand), **Mr. Ngatsha Sichone** (Zambia), **Ms. Escobar Pacas** (El Salvador), **Mr. Muiruri Ngugi** (Kenya), **Ms. Laborte-Cuevas** (Philippines), **Mr. Özsunay** (Turkey), **Ms. Viscasillas** (Spain), **Mr. Hamamoto** (Japan), **Mr. Sikiric** (Croatia), **Mr. Spelliscy** (Canada), **Mr. Wijnen** (Observer for the Netherlands), **Mr. Chen** (China), **Ms. Song** (Republic of Korea) and **Mr. Al Saeed** (Kuwait) expressed support for the proposal made by the representative of Mauritius and for the text of draft article 7(1) as orally amended.

13. **Mr. Cachapuz de Medeiros** (Brazil), echoing the statements of support already made, said that while some delegations had expressed support for the inclusion of “Mauritius” in the title of the Convention, it might be more appropriate to refer to the place in which the Convention would be signed, as was the case with respect to a number of international treaties. The title would thus be the “Port Louis Convention”.

14. **The Chair** said that the matter of the name of the convention had already been discussed with Mauritius and it had been felt that Port Louis might not be well known.

15. **Ms. Montineri** (International Trade Law Division) expressed sincere gratitude to the Government of Mauritius for its generous offer. The holding of the signing ceremony in Mauritius would give prominence to the convention.

16. The secretariat proposed that article 7(1) read: “This Convention is open for signature in Port Louis, Mauritius, on 17 March 2015, and thereafter the United Nations Headquarters in New York by any (a) State; or (b) regional economic integration organization that is constituted by States and is a contracting party to an investment treaty.”

17. *Paragraph 1, as amended, was approved.*

18. *Draft article 7 as a whole, as amended, was approved.*

*Draft article 3 (continued)*

*Paragraph 1 (continued)*

19. **The Chair** recalled that, at the Commission’s previous meeting, the delegation of Canada had proposed that paragraph 1(a) be amended to read:

“A Party may declare that:

(a) it shall not apply this Convention to investor-State arbitrations under a specific investment treaty, identified by title and name of the contracting parties to that investment treaty.”

20. *Paragraph 1, as amended, was approved.*

21. *Draft article 3 as a whole, as amended, was approved.*

*Draft article 4 (continued)*

22. **The Chair** said that the secretariat had proposed that the paragraphs of draft article 4 be reordered so that paragraph 2 as it appeared in document A/CN.9/812 would appear as the penultimate paragraph of the article.

23. *It was so decided.*

*Paragraph 6 (continued)*

24. **The Chair** invited the Commission to resume its consideration of the proposal, made at the Commission’s previous meeting, to amend paragraph 6 to read: “If, after this Convention has entered into force for a Party, that Party withdraws a reservation under article 3(1)(a) or 3(1)(b) with respect to a specific investment treaty, or a specific set of arbitration rules or procedures, or a reservation under article 3(1)(c) or 3(2), such withdrawal shall take effect upon receipt of the notification by the depositary.”

25. **Ms. Nguyen** (Observer for Viet Nam) said that, since paragraph 4 of the draft article provided that reservations other than those made under article 3(2) would take effect twelve months after the date of receipt by the depositary, paragraph 6 should establish the same time period with respect to the withdrawal of a reservation.

26. **Mr. Apter** (Israel) said that, while the proposed text improved the provision, it was important to provide States with clear guidance on how to make and withdraw reservations, and to make clear that an amendment to a reservation constituted a withdrawal of that reservation.

27. **The Chair** said that while it was certainly important that the *Travaux Préparatoires* clarified the understanding that a list of treaties or a set of arbitration rules or procedures excluded from the scope of the convention would be treated as constituting separate reservations, the Commission should consider whether the convention itself should explicitly provide to that effect.

28. **Mr. Taylor** (United Kingdom of Great Britain and Northern Ireland) said that since there was no longer a need for references to modification, such references should also be removed from draft article 5 for the sake of consistency.

29. **Mr. Schnabel** (United States of America), responding to the comments made by the Chair, proposed that, in order to ensure clarity regarding the effect of an instrument through which multiple changes were made to reservations within the same instrument or the combination



of multiple reservations was altered, such a provision be established either in either article 3, which would be the most appropriate place, or, subject to adjustment of the cross references, in article 4, reading:

“When a party makes a declaration under article 3, each investment treaty or set of arbitral rules or procedures to which the declaration refers and any part of the declaration made under paragraph 1(c) or article 3(2) shall be deemed to constitute a separate reservation for purposes of article 4.”

*The meeting was suspended at 11.10 a.m. and resumed at 12.25 p.m.*

30. **The Chair** suggested that the Commission resume its consideration of the proposal made by the representative of the United States of America at its next meeting.

31. *It was so agreed.*

**(c) Preparation of a guide on the 1958 New York Convention** (A/CN.9/786 and A/CN.9/814 and addenda)

32. **The Chair** recalled that the text of the guide on the New York Convention had been prepared by experts but had not been considered by the Commission as a whole and had therefore not undergone the detailed drafting that would be required in the case of such documents as a model law or convention with a view to achieving broad international consensus. That fact had raised concerns that the guide might be understood to be an outcome of the work of the Commission or as representing the views or opinions of the Commission or its member States. In order to address those concerns, it was proposed that the title of the guide be “UNCITRAL Secretariat Guide on the New York Convention” and that the guide include a disclaimer.

33. **Ms. Montineri** (International Trade Law Division) said that the secretariat proposed that the disclaimer read:

“This guide is intended to promote a harmonized approach and facilitate the uniform interpretation of the New York Convention with an aim to limiting legal disharmony and legal uncertainty arising from its imperfect or partial implementation. As a product of the work of the secretariat, based on expert inputs, the guide was not substantively discussed by the United Nations Commission on International Trade Law (UNCITRAL). Accordingly, the guide does not purport to reflect the views or opinions of UNCITRAL member States and does not constitute an official interpretation of the New York Convention.”

34. **Mr. Schneider** (Switzerland), **Mr. Schnabel** (United States of America) and **Mr. Apter** (Israel) expressed support for the proposed title and disclaimer, which best reflected the nature of the guide given that it was not a document that had been drafted and formally adopted by the Commission. It was important that the guide highlight that fact given that it would be used by practitioners as a valuable and authoritative resource.

35. **Mr. Marani** (Argentina) said that it was difficult to take a view on the proposed disclaimer without seeing the text in writing. As a preliminary comment, however, it appeared that the first sentence of the disclaimer could be deleted.

36. **The Chair** said he took it that the Commission wished to approve the proposed title of the guide and suggested that the Commission return to its consideration of the proposed disclaimer at its following meeting, after the proposed text had been circulated in writing.

37. *It was so decided.*

38. **The Chair** said that, subject to a final decision on the proposed disclaimer, the secretariat would require the Commission’s authorization to publish the guide electronically in all six official languages of the United Nations.

39. **Ms. Escobar Pacas** (El Salvador) asked whether the guide would fall under the responsibility of the secretariat and requested clarification as to the precise mandate that was required.

40. **Mr. Sorieul** (Secretary of the Commission) said that it was important that the Commission authorize publication of the guide in view of the issues raised concerning its interpretation by practitioners and the fact that publication in all six official languages would require considerable resources. A precedent for such authorization was that of the UNCITRAL Legal Guide on Electronic Funds Transfers, which, similarly to the guide on the New York Convention, had been drafted by the secretariat in collaboration with experts before being presented to the Commission and published on the basis of a formal request by the Commission to the secretariat.

41. **The Chair** said he took it that the Commission wished to authorize the secretariat to publish the guide electronically in all six languages of the United Nations.

42. *It was so decided.*

**(d) International commercial arbitration moot competitions**

43. **Ms. Montineri** (International Trade Law Division) said that the oral arguments phase of the Twenty-First Annual Willem C. Vis International Commercial Arbitration Moot competition had been held in Vienna in April 2014 with the participation of 291 teams representing 64 countries. More than 2,000 students from Vienna had taken part in the competition, and the best-performing team had been that of Deakin University of Australia. The Eleventh Willem C. Vis (East) International Commercial Arbitration Moot had been held in Hong Kong in the same month, with the participation of 99 teams representing 28 jurisdictions, and the Sixth Madrid International Commercial Arbitration Competition (“Moot Madrid”) had been held in Madrid, also in April.

44. **Ms. Viscasillas** (Spain), speaking both in her capacity as representative of Spain and as co-director of

Moot Madrid, said that the competition held in Madrid had been organized jointly by the Carlos III University of Madrid and UNCITRAL. It was an honour to organize the competition with a view to promoting international commercial arbitration. While Moot Madrid focused on the participation of Spanish-language institutions, participants from all countries were invited to participate.

45. **The Chair**, welcoming the excellent work conducted in the area of international commercial arbitration moot competitions, took it that the Commission wished to take note of the oral reports provided.

46. *It was so decided.*

**Planned and possible future work** (A/CN.9/807, 811, 815, 816 and 819-823)

47. **The Chair**, recalling that Working Group II had been mandated to commence work on the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings, said that a number of organizations had expressed an interest in contributing to that work. The Commission would need to consider how much time to devote to the revision. The project could span a year, including two weeks of conference time for Working Group II, with a view to consideration of the revised Notes by the Commission at its forty-eighth session in 2015.

48. Concerns had been raised in recent years with regard to the proliferation of instruments and standards developed in the area of international trade law. While it would be ideal for the Commission to focus on capacity-building and the implementation of existing instruments rather than the development of new standards, in practice it would be very difficult to shift resources to such capacity-building.

49. There were therefore two possible areas for future work: the first was concurrent proceedings in investment arbitration, which was becoming a subject of increasing importance, and the second was the enforcement of settlement agreements resulting from international commercial conciliation.

50. **Mr. Schnabel** (United States of America), drawing attention to the written proposal submitted by his delegation (A/CN.9/822), said that the development of a convention on the enforcement of settlement agreements resulting from international commercial conciliation would build on the prior work that UNCITRAL had carried out with respect to conciliation in recent years. The importance of conciliation, in terms not only of the ability of parties to preserve their ongoing business relationships and conserve their resources but also of the benefits to the legal system as a whole, was already recognized. One obstacle to the greater use of conciliation was the problem of the enforceability of resulting settlement agreements. Such agreements were generally enforceable as contracts between the parties, but enforcement could be time-consuming, burdensome and expensive, which was a disincentive to conciliation. Alternatively, parties sometimes commenced an arbitration simply for the purpose of transforming a settlement into an award on agreed terms, which provided them with the same benefits in terms of ease of enforcement but also entailed additional time and expense. Voluntary settlements should not be treated less favourably than awards and parties should not be discouraged from settling their disputes at an early stage, before having to commence any type of arbitral proceedings. Some jurisdictions already treated international commercial settlements resulting from conciliation as equivalent to awards; the aim of the proposed convention would be to provide that same benefit across borders. The proposed convention would not render enforceable settlement agreements that would otherwise not be enforceable, but rather would make settlement agreements more easily enforceable. There would be some difficult issues to address, a number of which were highlighted in the written proposal. However, the feedback received from stakeholders, including in the business community, had indicated that it would be a worthwhile project.

51. If the Commission was favourable to the proposal, preliminary discussions could commence at the Working Group's sixty-first session. Part of that session could be devoted to preliminary work on the revision of the Notes on Organizing Arbitral Proceedings, while the remainder of the session could be devoted to the proposed work on enforceability of international commercial settlement agreements.

52. **The Chair** suggested that the Commission consider the proposal at its next meeting.

53. *It was so agreed.*

*The meeting rose at 1 p.m.*

**Summary record of the 987th meeting (closed)**  
**Held at Headquarters, New York, on Tuesday, 8 July 2014, at 3 p.m.**

[A/CN.9/SR.987]

*Chairperson:* Mr. Salim Moollan (Vice-Chair) (Mauritius).

*The meeting was called to order at 3.10 p.m.*

**Consideration of issues in the area of arbitration and conciliation** (*continued*)

**(b) Establishment and functioning of the transparency repository**

1. **Mr. Sorieul** (Secretary of the Commission) said that the technical means for operation of the transparency repository had been made available following an upgrade of the UNCITRAL website to facilitate the functioning of the Case Law on UNCITRAL Texts (CLOUT) database, in the context of which a similar database, the Transparency Registry, had been established for the collection of case law relating to transparency in treaty-based investor-State arbitration. The Registry had entered into operation on 1 April 2014. On an experimental basis, the Government of Canada planned to publish on the Registry web page information on Canadian cases under the North American Free Trade Agreement. While that information was not directly related to the application of the Rules on Transparency, its publication would play an educational role and illustrate the manner in which the Registry would function as a global resource.

2. The Registry's operation would require human resource support. The European Commission had undertaken to provide funding that would allow the secretariat to hire a staff member for the project, at least on a part-time basis. However, UNCITRAL would have to consider whether, in the long term, the Registry should be funded by voluntary contributions or, if possible, by the regular United Nations budget, bearing in mind that extrabudgetary funding might not be available in the longer term. Such a situation might necessitate the redeployment of resources if the Registry was to be maintained, potentially to the detriment of the secretariat's other mandated activities.

3. Those questions would take a number of years to resolve, but it was important that efforts continue to be made to secure regular budget funding. In the meantime, the secretariat planned to establish a multi-year programme and hoped that, on the basis of the European Commission's contributions and other contributions that were actively being sought, it would be possible to operate the Registry effectively. He encouraged the Commission to reaffirm its support for the mandate of the secretariat to fulfil the role of transparency repository.

4. **Mr. Schnabel** (United States of America), expressing appreciation for the efforts of the secretariat to bring the Transparency Registry into operation and for the support provided by the European Commission, said that it was important that the operation of the Registry should not have a negative impact on the secretariat's other mandated

activities. He recalled that, at the Commission's forty-sixth session, several delegations had indicated that that function should be carried out on a cost-neutral basis in relation to the United Nations regular budget, and the International Centre for Settlement of Investment Disputes and the Permanent Court of Arbitration had offered to undertake the role of repository if the UNCITRAL secretariat was unable to do so, until such time as the UNCITRAL secretariat obtained the necessary resources. Since the extent to which voluntary contributions could be relied upon in the long term was unclear, and given the undesirability of diverting resources from other functions and the possibility that an increase in the budget might not be possible, the option of entrusting other entities with that role should be kept in mind.

5. **The Chair** said he took it that the Commission wished to reiterate its mandate to the secretariat to operate the Registry using the funds available to it for that purpose, and to seek further funding as necessary, until such time as a review of the situation became necessary.

*It was so decided.*

**(a) Finalization and approval of a draft convention on transparency in treaty-based investor-State arbitration** (*continued*) (A/CN.9/794, 799, 812 and 813 and Add.1)

*Draft articles 3 and 4* (continued)

6. **The Chair** said that agreement had been reached, in informal consultations, on the text of a new provision relating to multiple reservations listed in a single instrument and the withdrawal of such reservations, on the basis of the proposal made by the delegation of the United States of America at the Commission's previous meeting.

7. **Mr. Castello** (United States of America) said it was proposed that the new provision appear as a new paragraph 3 of draft article 3, to read: "Parties may make multiple declarations in a single instrument. When this occurs, each such declaration in respect of a specific investment treaty under article 3(1)(a) or a specific set of arbitration rules or procedures under article 3(1)(b), or any such declaration in respect of article 3(1)(c) or article 3(2), shall constitute a separate reservation capable of separate withdrawal under article 4(5)." In considering the proposed new text, it had been realized that the language of draft article 4, paragraph 6, as set out in document A/CN.9/812, partly duplicated the proposed new provision and could be condensed. That language had therefore been revised.

8. **Mr. Marani** (Argentina), endorsing that proposal, said that the proposed text clarified the mechanism for reservations and withdrawals.

9. **Mr. Apter** (Israel), supported by **Mr. Schneider** (Switzerland), said that the words “When this occurs,” were unnecessary and could therefore be deleted.
10. **Mr. Loh** (Singapore), supported by **Mr. Mirza** (Pakistan) and **Ms. Escobar Pacas** (El Salvador), said that while his delegation had no objection to the use of “declare” as a verb in draft article 3, paragraph 1, the noun “declaration” should be replaced with the noun “reservation” in the proposed new provision for the sake of consistency with the provisions of draft article 4 and the heading of article 3 and in view of the difference, from a legal perspective, between a declaration and a reservation.
11. **Mr. Marani** (Argentina), supported by **Mr. Özsunay** (Turkey), **Mr. Taylor** (United Kingdom of Great Britain and Northern Ireland), **Mr. Von Walter** (Observer for the European Union), **Mr. Maradiaga** (Honduras) and **Mr. Asawawattanaporn** (Thailand), proposed that the word “declarations” be replaced with the word “reservations” in the first sentence of the proposed paragraph, but that the word “declaration” in the second sentence be retained in order to reflect the fact that a reservation was the result of the making of a declaration under article 3. The words “When this occurs,” should be retained in order to preserve that link between the two sentences.
12. **The Chair** said that that proposal would require further adjustment of the second sentence: the words “each such declaration” would have to be replaced with the words “each declaration made” and the words “any such declaration” with the words “any declaration”.
13. **Ms. Viscasillas** (Spain), supported by **Mr. Schöfisch** (Germany), said that, while her delegation had no objection to the proposal to replace the word “declaration” with the word “reservation”, those changes were unnecessary, since the proposed provision, read together with paragraphs 1 and 4 of draft article 3, made clear the mechanism by which a reservation was effected. Moreover, the terms “declaration” and “reservation” appeared to be used interchangeably in the United Nations Convention on Contracts for the International Sale of Goods. She endorsed the proposal to delete the words “When this occurs,”.
14. **Mr. Spelliscy** (Canada), expressing support for the proposal made by the representative of Argentina, proposed that the words “When this occurs,” be replaced with the words “In such cases,” or a similar alternative formulation.
15. **The Chair** suggested that the text of the proposed provision be finalized during informal consultations.
16. *It was so agreed.*
17. **The Chair** said it was proposed that article 3(3) read:  
 “Parties may make multiple reservations in a single instrument. In such an instrument, each declaration made: (a) In respect of a specific investment treaty under paragraph (1)(a); (b) In respect of a specific set of arbitration rules or procedures under paragraph (1)(b); (c) Under paragraph (1)(c); or (d) Under paragraph (2); shall constitute a separate reservation capable of separate withdrawal under article 4(6).”
18. **Mr. Muiruri Ngugi** (Kenya) said that, while he supported that proposal, he wondered whether the words “capable of separate withdrawal under article 4(6)” were necessary given that the question of withdrawal would be dealt with separately under article 4.
19. **The Chair** said that that wording, while not strictly necessary, provided clarity.
20. **Ms. Salasky** (International Trade Law Division) said that, further to advice provided by the Treaty Section of the United Nations Office of Legal Affairs, references to notification would be replaced with references to deposit with the depositary throughout article 4.
21. *Draft articles 3 and 4, as amended, were approved.*
- Draft article 5 (continued)*
22. **Mr. Hamamoto** (Japan) sought clarification as to whether references to modification would be removed from draft article 5 in view of the amendments made to draft articles 3 and 4.
23. **The Chair** said he took it that that was the Commission’s understanding and that draft article 5 would be amended accordingly.
24. *It was so decided.*
25. **The Chair** said that the Commission had thus concluded its consideration and approval of the draft convention on transparency in treaty-based investor-State arbitration. It remained for the Commission to adopt the draft decision adopting the Convention on Transparency in Treaty-based Investor-State Arbitration, as contained in document A/CN.9/XLVII/CRP.3. He pointed out that, following the Commission’s decision with regard to the signing ceremony for the convention, operative paragraph 2(ii) would be amended to read “authorizing a signing ceremony to be held on 17 March 2015 in Port Louis, Mauritius, upon which the Convention would be open for signature; and”.
26. **Ms. Pólit** (Ecuador) said that operative paragraph 2 of the draft decision appeared not to reflect fully the text that Working Group II had proposed for inclusion in that decision (A/CN.9/812, paragraph 8).

*The meeting was adjourned at 3.55 p.m. and resumed at 4.15 p.m.*

27. **The Chair** said that the *Travaux Préparatoires* would refer in full to the Working Group's recommendation, which the Commission was effectively endorsing through the draft decision.

28. *The draft decision, as amended, was adopted.*

**(c) Preparation of a guide on the 1958 New York Convention** (*continued*) (A/CN.9/786 and A/CN.9/814 and addenda)

29. **Mr. Schneider** (Switzerland) said that the second sentence of the disclaimer proposed by the secretariat at the Commission's previous meeting ("As a product of the work of the secretariat, based on expert inputs, the Guide was not substantively discussed by the United Nations Commission on International Trade Law (UNCITRAL).") suggested that the work of the secretariat in general was not substantively discussed by the Commission. In order to avoid that misunderstanding, he proposed that the sentence be amended to read: "The Guide is a product of the work of the secretariat based on expert input, and was not substantively discussed by the United Nations Commission on International Trade Law (UNCITRAL)".

30. **Mr. Marani** (Argentina) said that the first sentence of the proposed disclaimer ("This Guide is intended to promote a harmonized approach and facilitate the uniform interpretation of the New York Convention with an aim to limiting legal disharmony and legal uncertainty arising from its imperfect or partial implementation") should be deleted, as that text was already reflected in the foreword to the Guide. The remaining text made the nature and purpose of the Guide sufficiently clear. Thus, the disclaimer could begin with the text of the second sentence as proposed by the representative of Switzerland.

31. **Mr. Mirza** (Pakistan) proposed that the disclaimer be shortened, by deletion of the first two sentences, to read "The Guide does not purport to reflect the views or opinions of UNCITRAL member States and does not constitute an official interpretation of the New York Convention."

32. **The Chair** said that the second sentence should be retained because it explained the process by which the Guide had evolved, and the need for the disclaimer. On that understanding, he took it that the Commission wished to accept the proposal made by the representative of Argentina, the disclaimer thus reading: "The Guide is a product of the work of the secretariat based on expert input, and was not substantively discussed by the United Nations Commission on International Trade Law (UNCITRAL). Accordingly, the Guide does not purport to reflect the views or opinions of UNCITRAL member States and does not constitute an official interpretation of the New York Convention."

33. *It was so decided.*

34. **Mr. Marani** (Argentina) said that, in view of the fact that the Commission had agreed to give the Guide the title "UNCITRAL Secretariat Guide on the New York Convention", that title should be reflected throughout the Guide itself.

35. **The Chair** said that the text of the Guide would be adjusted accordingly.

*The meeting rose at 4.45 p.m.*

**Summary record of the 988th meeting (closed)**  
**Held at Headquarters, New York, on Wednesday, 9 July 2014, at 10 a.m.**

[A/CN.9/SR.988]

*Chairperson:* Mr. Salim Moollan (Vice-Chair) (Mauritius).

*The meeting was called to order at 10.15 a.m.*

**Planned and possible future work (continued)**

(A/CN.9/807, 811, 815, 816 and 819-823)

1. **Mr. Jacquet** (France), referring to the proposal submitted by the delegation of the United States of America (A/CN.9/822), said that the enforceability of international commercial settlement agreements reached through conciliation was an important issue that warranted the Commission's further consideration. While such enforceability was desirable, the question of giving such agreements the same status as an arbitral award was a delicate one. He therefore sought clarification on a number of points relating to the proposal.

2. The first question was whether, if the proposed convention was prepared, that convention would establish a uniform regime under which every settlement agreement reached through international commercial conciliation would be recognized as having the same effect as an arbitral award, or whether such an enforcement regime would be optional.

3. The Commission would need to decide on the precise nature of such agreements and the language it would use to define them, thus having to create a new legal instrument capable of becoming an arbitral award or having all the features of such an award. That objective might be difficult to achieve. During the revision of the UNCITRAL Model Law on International Commercial Arbitration, the issue of whether an interim measure could be established as enforceable in the same way as an award, and thus as a new legal concept, had presented great difficulties. While those difficulties had eventually been resolved through the decision to provide for the use of preliminary orders, the legal regime for the enforcement of interim measures as enshrined in the Model Law was not attractive, and there was a risk that similar difficulties might arise from attempts to establish a legal regime applicable to settlement agreements resulting from international commercial conciliation. It was not a matter of language alone; in order for such a system to be convincing, a specific legal instrument and a specific legal regime applicable to such instruments would have to be developed.

4. If such agreements were to be treated in the same way as arbitral awards, the question of whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) would apply to them presented an additional problem. The New York Convention defined what an arbitral award was, and it would be difficult to amend that definition. The rules set out in the Convention with respect to the enforcement of

arbitral awards were based on the assumption that those awards were the outcome of arbitral proceedings rather than a negotiation process, which neither had the same objectives nor offered the same guarantees, and were therefore unsuited to the purpose of ensuring the enforceability of settlement agreements resulting from conciliation. The Commission might therefore wish to consider the possibility of establishing, under the proposed convention, a *sui generis* system independent of the New York Convention. It should also consider whether such a system would be secure and effective and inspire confidence.

5. While the proposal submitted was worthy of further consideration, the concerns he had highlighted and the uncertainty of the outcome of such a project should be borne in mind. There were various ways in which consideration of the proposal and the issues it raised could be approached. The secretariat could provide, on the basis of views expressed at the Commission's current session, a preliminary draft for further discussion by Working Group II. Alternatively, the Working Group could dedicate a single session to considering a draft or the project as a whole to decide whether it was sufficiently promising as to warrant the Working Group's further consideration. If the issues were considered too difficult, an alternative approach could be considered or the project could be abandoned or postponed.

6. **Mr. Hamamoto** (Japan) wondered how useful the proposed convention would be in practice, and whether such a convention was really necessary. As noted in document A/CN.9/822, many jurisdictions and institutions already treated settlement agreements reached through conciliation as arbitral awards for the sake of ease of enforceability. Research might well prove that such practice was even more widespread.

7. However, the useful solution that such simplified proceedings provided, while "a legal fiction" as described in the proposal, should be considered, particularly since it often saved time and costs. One possible starting point would be to research the number of States that had adopted a system such as that provided for by the Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, whereby the parties to conciliation could appoint a mediator as an arbitrator for the purpose of confirming a settlement agreement as an arbitral award. The Commission could prepare a recommendation encouraging United Nations Member States and arbitration institutions to consider the usefulness of establishing such a system under domestic law or mediation rules.

8. **The Chair** wondered what the effect would be of a settlement agreement that had become an award, particularly if the outcome of conciliation was complicated, for example in terms of the obligations it created, and how the New York Convention would apply to such a settlement.

9. **Mr. Möller** (Observer for Finland) said that while he agreed that the issue warranted further consideration, he shared the doubts expressed by previous speakers. He recalled that, at the time of drafting of the UNCITRAL Model Law on International Commercial Conciliation, efforts made to establish provisions on the enforceability of settlement agreements had been unsuccessful, among other reasons because, as had been highlighted, such settlement agreements could be complex and might therefore be difficult to enforce. It was therefore important that, if a specific instrument was to be developed, the project should succeed. Before it was taken up as part of the Commission's work programme, it should be further explored, perhaps through additional research by the secretariat.

10. **Mr. Apter** (Israel) welcomed the proposed project as a good way forward in addressing the increasing use and desirability of conciliation as an alternative to international arbitration, the potential costs of which were an important consideration for companies from smaller States in particular. It would also address the divergence of practices and views with respect to the enforcement of settlement agreements and the fact that seeking the recognition of such agreements as awards could also be costly and their enforcement problematic. While he agreed that proceeding with the drafting of a convention as proposed would present major challenges, that was the case with regard to every project that the Commission undertook. It might be possible to prepare the convention with the same speed with which work on the draft convention on transparency in treaty-based investor-State arbitration had been concluded, provided that the convention, like the New York Convention, achieved the right balance and contained appropriate safeguards. The Commission should therefore address the issue as a matter of priority but could decide after one year whether or not the project should be pursued. He proposed that the Working Group devote one or two days of its upcoming sixty-first session to revision of the Notes on Organizing Arbitral Proceedings and the remainder of that session to the issue of enforceability of settlement agreements, the possibility of drafting a convention as proposed and the main principles to be reflected in such an instrument. It would be important, in doing so, to find out what work other organizations were carrying out in that area so as to avoid any duplication of effort.

11. **Mr. Sorieul** (Secretary of the Commission) recalled that the enforceability of settlement agreements and the variety of relevant practices under different national legal systems had been discussed by the Working Group for a number of years, particularly in the context of preparation of the UNCITRAL Model Law on International

Commercial Conciliation of 2002. The solution reached at that time had been to establish what was effectively a recommendation in the Model Law to the effect that national legislation should ideally establish a mechanism for the enforcement of such agreements. One of the reasons for the decision made at that time not to go beyond that recommendation was that the subject was complex and possible solutions diverse. It had therefore been felt that the only appropriate way forward would be to prepare a convention creating a specific and uniform instrument and establishing the enforcement of such agreements as mandatory. However, a model law might be more appropriate than a convention as a means of addressing the issue.

12. **The Chair** drew attention to article 14 of the Model Law on the enforceability of settlement agreements and to paragraphs 90 and 91 of the Guide to Enactment and Use of the Model Law, which gave a number of examples of how some legal systems dealt with the issue.

13. **Mr. Chen** (China), welcoming the proposal made by the United States, said that while the issue raised a number of concerns and challenges as already highlighted by previous speakers, it was important to recognize the growing importance and practical benefits of commercial conciliation, which included avoidance of the potentially high costs of arbitration, and the interest in the enforceability of resulting settlement agreements, as well as the problems that their enforcement could pose. He endorsed the view that, in order to determine the best approach, the issue required further research on the diverse legislation and practices established worldwide, the perspective of the commercial sector and the various possible outcomes of conciliation, including the question of the types of agreement that could be enforced under the proposed convention and the question of whether certain outcomes, such as complex contracts, would have to be handled differently.

14. **Ms. Cordero-Moss** (Observer for Norway) concurred that conciliation and settlement agreements resulting from that process were increasingly important in international commerce. In examining the issue, it should be borne in mind that while providing for the enforceability of settlement agreements would bring conciliation closer to arbitration and would make it more efficient and effective, thus encouraging its use, it could deprive conciliation of one of its most important characteristics, namely the contractual nature of settlements, which was what made conciliation an attractive option in some contexts. Moreover, in some cases settlement agreements were complex and their enforcement more problematic than that of a simple award.

15. She agreed that it would be premature to conclude that a convention was the most appropriate means of approaching the issue of enforceability, and alternative means should be explored before the Commission embarked on such a project. For example, as a first step, the secretariat could organize an international seminar or survey to identify situations where enforceability was

desirable and where it was not, and to determine whether there was consensus on the need for an instrument providing for such enforceability. The secretariat could then prepare a paper on the results of that activity.

16. **Mr. Mirza** (Pakistan) expressed full support for the proposal made by the representative of the United States in view of the usefulness, effectiveness and cost-effectiveness of conciliation as borne out by his country's experience of that process, particularly with respect to the securities market. He agreed that more research would need to be conducted as a preliminary step, and expressed support for the holding of an international seminar or conference for that purpose.

17. **Mr. Schneider** (Switzerland) said that he supported the proposed work on a draft convention in view of the work already conducted by the Commission in that area and the desirability of promoting conciliation. The complexity of some settlement agreements need not pose an obstacle to such an undertaking, particularly given that arbitral awards and their enforcement could also be complex. However, he agreed that further research addressing a number of issues would need to be carried out before such a project was undertaken, including examination of the question of whether the availability of an enforcement mechanism as proposed would really promote conciliation given that the decision of parties to a dispute to enter into conciliation was in some cases based on motivations other than ease of enforceability of the resulting agreement. The business community should be consulted in that regard.

18. While the development of a legal instrument that facilitated enforcement by serving the same purpose as an award might be desirable, it was important to ensure that such an instrument would not be liable to abuse. A further concern related to exceptions to enforcement: the written proposal of the United States delegation indicated that exceptions similar to those provided for in article V of the New York Convention should be established, yet there were fundamental differences between the exceptions set out in that Convention and those that would need to be established with respect to settlement agreements. In particular, if a settlement was not enforced owing to disagreement between the parties, for example with regard to the validity of the settlement, whether the conditions for the settlement had been met or whether there were ambiguities in the settlement that had to be resolved, the question arose of whether the enforcement judge would be in a position to resolve that disagreement.

19. While those concerns should not be an impediment to pursuing the proposed work, they should be carefully considered. In particular, it was important to gather information on practical experience of cases in which settlement agreements reached through conciliation had been enforced, including cases in which they had been treated as or converted into awards, how existing laws and regulations had applied and the issues that had arisen in such cases. The prior work carried out by the Commission

and the Working Group in the area should be compiled for submission to the Commission or Working Group.

20. **The Chair** said that the legal implications of the proposed enforcement regime should also be considered among the issues raised.

21. **Mr. Taylor** (United Kingdom) said that there appeared to be general agreement among stakeholders that conciliation was an effective tool and should be promoted. While, as already pointed out, there were a number of issues other than lack of enforceability that might discourage use of conciliation, the proposed convention would lend it further legitimacy. Bearing in mind the Working Group's other priorities and Commission resources, the project could be further developed by the Working Group at its upcoming sessions. His delegation supported the proposal that the Working Group dedicate one or two days of its sixty-first session to revision of the Notes on Organizing Arbitral Proceedings and the remainder of that session to the issue of enforceability of settlement agreements.

22. **Mr. Schöfisch** (Germany) said that revision of the Notes should be given the highest priority and should therefore be the focus of the Working Group's upcoming sessions, followed by work on concurrent proceedings, with respect to which he welcomed the idea of a colloquium as referred to in document A/CN.9/816.

23. The proposal made with regard to the enforceability of settlement agreements was worth pursuing, subject to further research by the secretariat and consideration by the Working Group, and taking into account prior discussions on the subject, as suggested by other delegations. However, it was unnecessary to take an immediate decision on how to proceed with that issue. He therefore proposed that the Working Group dedicate one day of its sixty-first session to consideration of whether the Commission should take up that issue in the future and whether the secretariat should be tasked with further studies. The Commission could then take a decision on the matter at its forty-eighth session.

24. **Mr. Spelliscy** (Canada) agreed that the revision of the Notes on Organizing Arbitral Proceedings should take priority and proposed that, since one or two days of the Working Group's sixty-first session might not suffice, the Working Group focus on the Notes at that session to ensure that sufficient time was available to conclude discussions on that issue.

25. His delegation supported both the United States proposal relating to conciliation and the proposal to work on concurrent proceedings. The latter work might benefit from further study and a clearer direction over the course of the next year. In view of the fact that the Working Group might not be in a position to consider that issue adequately even at its sixty-second session in February 2015, the project could be on the Commission's agenda at its forty-eighth session, for discussion on the basis of a report by the secretariat and a decision as to whether the Commission should mandate the Working Group to pursue



work on that topic. While it would be worthwhile for the Working Group to do so, both the Commission and the Working Group needed further guidance as to how exactly that work should proceed, given that the issue of concurrent proceedings was broad and complex and a number of aspects could be addressed.

26. While there was support in the Canadian business community for the proposed convention on the enforcement of settlement agreements, his delegation shared the concerns already expressed as to whether the New York Convention was the most appropriate model for such a convention. He therefore endorsed the view that the secretariat should undertake further studies until the sixty-second session of the Working Group and that the Commission should mandate the Working Group to consider at that session possible ways forward, with a view to making a recommendation to the Commission at its forty-eighth session as to whether to pursue work on the proposed convention or another instrument.

27. **Ms. Pólit** (Ecuador) echoed the concerns expressed with regard to the development of an instrument giving binding effect to settlement agreements reached through conciliation, which would change the nature of, or contradict the purpose of, conciliation, namely to achieve agreement between the parties and thus avoid escalation of their dispute and the need to impose an instrument ending that dispute. In view of the uncertainty of the issues surrounding the enforceability of settlement agreements and the various concerns raised, a convention would not be an appropriate way forward. However, the issue was one of great importance and worthy of further discussion by the Working Group.

28. **Ms. Escobar Pacas** (El Salvador), expressing support for the comments made by the representative of Canada, asked how long work on the revision of the Notes on Organizing Arbitral Proceedings was expected to take.

29. **The Chair** said that the secretariat envisaged two weeks' work by the Working Group on that topic, i.e. at its sixty-first and sixty-second sessions, although there appeared to be agreement among delegations that that work could be completed more quickly. The proposed research by the secretariat on the enforcement of settlement agreements was unlikely to be concluded by the Working Group's sixty-first session, but a working paper could be prepared by its sixty-second session. The whole of the sixty-second session could be devoted to that issue, assuming that the work on the Notes on Organizing Arbitral Proceedings was concluded by the end of the sixty-first session. Alternatively, the matter could be taken up during the sixty-second session or its consideration could simply be deferred.

30. **Ms. Seeman** (Observer for the International Institute for Conflict Prevention and Resolution) said that the work of her organization, in various countries and regions, with governmental entities, non-governmental organizations and businesses that wished to strengthen and expand the use of commercial conciliation had demonstrated that

conciliation was considered to be an essential tool in dispute resolution and that there was great interest in the expansion of its use. However, the reservation most commonly expressed with regard to the use of conciliation in international commercial disputes was that, after a significant investment of time and effort resulting in an agreement, it was sometimes the case that one of the parties failed to perform its obligations under that agreement. The proposed work would address that issue directly. While it had been argued by some delegations that the model of converting mediated settlement agreements into binding awards obviated the need for the proposed convention, it was common business practice to seek mediation precisely in order to avoid the imposition of an award.

31. **Ms. Matias** (Observer for the Jerusalem Arbitration Center), endorsing those comments, said that the proposed convention could greatly enhance trade and the use of alternative dispute resolution tools in areas of conflict. She therefore urged the Commission to consider mandating the Working Group to continue its work on that topic.

32. **Mr. Taylor** (United Kingdom) endorsed the comments made by the representative of Canada with regard to work on concurrent proceedings. The various proposals made with regard to the use of the Working Group's time raised the question of how the Commission could most efficiently use the resources available to it and how the Working Group could most effectively function. The scheduling of discussions on different topics within the same Working Group session might require the participation of different experts, thus potentially posing difficulties for those States sending only one delegate. On the other hand, it had the advantage of enabling the Working Group to take up preliminary consideration of a new project and then to develop that project during the intersessional period.

33. **The Chair** said that, while the point made with regard to delegations' participation should indeed be taken into consideration, all of the Commission's working groups had parallel work streams. He proposed that, on the basis of the views expressed, the Working Group consider the revision of the Notes on Organizing Arbitral Proceedings at its sixty-first session and, if necessary, its sixty-second session, and that the Commission mandate the secretariat to undertake further research on the enforcement of settlement agreements resulting from conciliation, including the issues raised by delegations, with a view to preliminary consideration of that topic at the Working Group's sixty-second session in February 2015, assuming that the work on the Notes would be concluded before or during that session. The Working Group could then decide how work on that subject should proceed, submitting a recommendation in that regard to the Commission. It was important that the Working Group be given maximum flexibility in addressing the issue.

34. He further proposed that the secretariat be mandated to explore the issue of concurrent proceedings and to report to the Commission on its work with a view to

consideration of the topic by the Working Group after its sixty-third session in the autumn of 2015.

35. **Mr. Schöfisch** (Germany) sought clarification as to whether the Commission had decided to hold a colloquium on parallel proceedings as referred to in document A/CN.9/816, and if so, when that event would take place.

36. **The Chair** said that the secretariat could organize in the coming year, perhaps in February 2015, an event similar to the conference on concurrent proceedings in investment disputes that had been organized jointly by UNCITRAL, the International Arbitration Institute (IAI) and the Geneva Centre for International Dispute Settlement (CIDS) in November 2013, on which the work on concurrent proceedings would build. It was desirable that the issue be pursued further, given the work already carried out by the secretariat in that area, but it was important first to consider whether the issue of concurrent proceedings should be discussed only in relation to investment arbitration or in relation to arbitration in general, including commercial arbitration. The issue of concurrent proceedings in investment arbitration alone was a broad and complex subject, and additional discussion of the commercial arbitration context would be very problematic, requiring extension of the mandate given to the secretariat. He therefore proposed that, for the time being, the issue be confined to the area of investment arbitration.

37. **Mr. Schöll** (Switzerland) said that there was indeed a great difference in practice between concurrent proceedings in investment arbitration and those in commercial arbitration. In order for the Commission to be able to take a decision as to which area to focus on, the maximum possible amount of information should be available for initial consideration, resources permitting. It would therefore be useful if the secretariat could extend its research to cover concurrent proceedings in commercial arbitration.

38. **Mr. Schnabel** (United States), welcoming the support expressed for his delegation's proposal for work in the area of enforcement of settlement agreements, said that his delegation would prefer the dedication of most if not all of the Working Group's sixty-second session to consideration of that issue.

39. In further exploring concurrent proceedings, it would be particularly useful to research that subject not only from the perspective of investor States but also from that of businesses in order to determine whether the former or the latter were most frequently affected by the problems presented by concurrent proceedings, and to research how often those problems occurred in general.

40. **The Chair** agreed that, while flexibility was desirable, the Working Group should take up consideration of the issue of enforcement of settlement agreements no later than during the sixty-second session. However, it was undesirable to reserve the entire duration of that session for those discussions unless work on the Notes on Organizing Arbitral Proceedings had been concluded by that time. He

therefore proposed that two days of that session be set aside for consideration of the conciliation issue; any additional time that became available could also be used for that purpose.

41. **Mr. Sorieul** (Secretary of the Commission) said it was important that specific proposals be made with respect to the use of the time of Working Group II at the two upcoming sessions in order to ensure that sufficient time was allocated for the topics discussion of which delegations had requested, in view of the fact that discussion of the general priorities of the Commission at the following week of the Commission's session could influence the decision as to which Working Group was allocated conference time. It should be borne in mind that the two weeks in question were not necessarily set aside for Working Group II; the other working groups would also be seeking conference time, and other projects might be proposed.

42. **Ms. Montineri** (International Trade Law Division) suggested that, in the interests of efficiency, the Working Group, when working on the revision of the Notes on Organizing Arbitral Proceedings, should focus on matters of substance, leaving drafting to the secretariat. The secretariat envisaged that that work would take a minimum of one week and a maximum of two weeks, bearing in mind that there had been some discussion of the possibility of including advice on transparency and on investment arbitration in the Notes, which might require more time.

43. Since the issue of enforcement of settlement agreements resulting from conciliation would involve considerable work, including an analysis of comparative law, it was unrealistic to envisage that that work could be completed within two sessions. The secretariat would need the Commission's mandate to gather information from member States to assist it in its research. In addition, it was organizing a major conference on conciliation, mediation and enforcement to be held in India in 2015 in order to study the issue further. Since the organization of a colloquium would require resources that might not be available, it would be desirable to continue researching the issue in consultation with experts and other organizations such as the Organization for Economic Cooperation and Development.

44. With regard to concurrent proceedings, the secretariat would prefer to address investment arbitration initially in view of the fact that that subject had been the focus of its work so far, and that the subject of concurrent proceedings in commercial arbitration was completely different, thus requiring a different type of work.

45. **Mr. Apter** (Israel) expressed support for the proposals made by the Chair and by the secretariat, particularly with regard to the revision of the Notes on Organizing Arbitral Proceedings, since the addressing of substantive issues rather than drafting work would facilitate internal consultations by member States and might make time available for substantial consideration of the proposed convention on the enforcement of settlement

agreements at the Working Group's sixty-second session. That subject was more relevant to all member States than that of concurrent proceedings, which could be taken up by the Commission at its forty-eighth session with a view to a decision at that session as to whether the issue warranted the use of Commission and Working Group resources, and whether only investment arbitration would be dealt with, in view of the concerns raised.

46. **Mr. Schneider** (Switzerland) said that, with regard to parallel proceedings in investment arbitration, it was important to distinguish between treaty-based and contract-based investment disputes. While it would be useful to confine consideration of the issue of parallel proceedings to treaty-based investment disputes owing to the specific problems that such proceedings raised in that context, it would be unwise to narrow the Commission's perspective in such a way given that some of the problems presented by parallel proceedings arose in other or all areas of arbitration, and work in such a limited area might have implications in other areas of arbitration practice. The issue should therefore be considered in its entirety, without restriction of the scope of the research to be carried out to investment or treaty-based investment arbitration. In view of resource constraints, the secretariat should make reference to relevant work carried out by other bodies and seek their support in its research. On the basis of a more comprehensive analysis, the conclusion might be reached that different instruments were needed to address the problems of concurrent proceedings in different areas.

47. **The Chair** said that, while he agreed that specific issues arising with respect to investment arbitration could not be addressed without consideration of the commercial context and other areas, given that those issues were often a manifestation of a wider problem, it was also necessary to be mindful of resource constraints and the risk of achieving nothing if the Commission tried to achieve too much.

48. **Ms. Montineri** (International Trade Law Division) clarified that the secretariat was not ruling out consideration of concurrent proceedings in commercial arbitration and would bear in mind, in the course of its research, that the problems under consideration were part of a broader context. It was necessary for the secretariat to have a clearly defined mandate from the Commission in order to be able to identify the problems clearly and seek possible concrete solutions.

49. **Mr. Chen** (China) said that the practical implications of any work carried out in the area of concurrent proceedings should be borne in mind. One possible way to overcome the problem of limited resources would be to prioritize the consideration of concurrent proceedings in the context of investor-State arbitration and, in doing so, to determine whether there were any possible outcomes that would have implications for concurrent proceedings in commercial arbitration, with a view to determining whether the Commission should then pursue the commercial arbitration context further.

50. **The Chair** suggested that the mandate of Working Group II be drafted in informal consultations, to form part of the report of the session of the Commission.

51. *It was so agreed.*

*The meeting was suspended at 12.05 p.m. and resumed at 12.45 p.m.*

52. **The Chair** said that agreement had been reached in informal consultations that the mandate of Working Group II should be set out in the relevant part of the draft report of the session to read:

"After discussion, the Commission agreed that the Working Group should consider, at its sixty-first and, if necessary, its sixty-second session, the revision of the UNICITRAL Notes on Organizing Arbitral Proceedings (the Notes). In so doing, the Working Group should focus on matters of substance, leaving drafting to the secretariat.

"The Commission further agreed that Working Group II should also consider, at its sixty-second session, the issue of enforcement of international settlement agreements resulting from conciliation proceedings and shall report to the Commission at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area. The Commission invited delegations to provide information to the secretariat in respect of that subject matter.

"In relation to the issue of concurrent proceedings, the Commission agreed that the secretariat should explore the matter further, in close cooperation with experts from other organizations working actively in that field. This work should focus on treaty-based investor-State arbitration, without disregarding the issue in the context of international commercial arbitration. The Commission requested the secretariat to report to the Commission at a future session, outlining the issues at stake and identifying work that UNCITRAL might usefully undertake in the field."

53. He took it that the proposed text was acceptable to the Commission.

54. *It was so decided.*

#### **Adoption of the report of the Commission**

*Draft convention on transparency in treaty-based investor-State arbitration (A/CN.9/XLVII/CRP.1/Add.1 and Add.2, A/CN.9/XLVII/CRP.2 and CRP.3)*

55. **The Chair** drew attention to document A/CN.9/XLVII/CRP.1/Add.1, which concerned the finalization and approval of the draft convention on transparency in treaty-based investor-State arbitration and would form part of the report of the Commission.

56. **Ms. Montineri** (International Trade Law Division) proposed that, in paragraph 5, the word "confirmed" in "The Commission further confirmed the agreement of the

Working Group” be replaced with the word “endorsed”, and that the final part of the paragraph, following the comma, read “but rather that the proposal for the General Assembly resolution recommending the transparency convention contain the wording as set out in document A/CN.9/794, paragraph 41.”

57. *It was so decided.*

58. **The Chair** proposed that paragraph 14 be amended to read “It was clarified that this analysis applied to article 2(1) but not to article 2(2) since article 2(2) constitutes a unilateral undertaking that does not modify the existing investment treaty.”

59. **Mr. Spelliscy** (Canada) said that, while he had no objection to that proposal, it was his understanding that the paragraph as originally drafted referred to a situation in which one of the parties to the investment treaty was party also to the convention but the other was not, rather than to a situation in which both parties were parties to the convention but one had made a reservation, in which case the convention would constitute a successive treaty. It might therefore be preferable for the proposed text to read along the lines of “It was clarified that this analysis applied to article 2(1) but not to article 2(2) where only one party to the investment treaty had acceded to the convention, since in that situation article 2(2) constitutes a unilateral undertaking that does not modify the existing investment treaty.” That might more accurately capture the specific situation that the Commission was seeking to describe.

60. **The Chair** said that paragraph 14 might cause confusion regardless of how it was drafted, since paragraph 13 already made clear that the Commission had decided that the transparency convention, on coming into force, would constitute a successive treaty. Moreover, paragraph 14 reflected only one comment made during the Commission’s deliberations, and that comment had added little to the substantive debate. He therefore proposed that it be deleted.

61. *It was so decided.*

62. **The Chair** further proposed that, in view of that deletion and the importance of the decision reflected in paragraph 13, the word “unanimously” be inserted after the word “Commission” in “The Commission confirmed” in that paragraph.

63. *It was so decided.*

*The meeting rose at 1 p.m.*

**Summary record (partial) of the 989th meeting (closed)  
Held at Headquarters, New York, on Wednesday, 9 July 2014, at 3 p.m.**

[A/CN.9/SR.989]

*Chairperson:* Mr. Salim Moollan (Vice-Chair) (Mauritius)

*The meeting was called to order at 3.05 p.m.*

**Adoption of the report of the Commission** (*continued*)

*Draft convention on transparency in treaty-based investor-State arbitration* (continued)

(A/CN.9/XLVII/CRP.1/Add.1 and Add.2,  
A/CN.9/XLVII/CRP.2 and CRP.3)

1. **The Chair**, having invited the Commission to resume its consideration of document A/CN.9/XLVII/CRP.1/Add.1, proposed that the second sentence of paragraph 39 of that document be amended to include an explanation as to why the proposal referred to had not received support, thus reading “That proposal did not receive support, since the declaration referred to in that phrase is the mechanism through which a reservation is made.” The proposed amendment would link that paragraph to paragraph 16 of A/CN.9/XLVII/CRP.1/Add.2, which addressed the use of the terms “declaration” and “reservation”.

2. **Mr. Spelliscy** (Canada) sought clarification as to whether, in accordance with paragraph 8 of document A/CN.9/XLVII/CRP.1/Add.2, paragraph 39 was to be replaced with the text “After discussion, the revised proposal for article 3(1)(a) as set out in paragraph 37 of document A/CN.9/XLVII/CRP.1/Add.1, was agreed.”

3. **Ms. Montineri** (International Trade Law Division) clarified that the confusion had been caused by an error in document A/CN.9/XLVII/CRP.1/Add.2: the text set out in paragraph 8 of that document would replace paragraph 38, rather than paragraph 39, of document A/CN.9/XLVII/CRP.1/Add.1.

4. **The Chair** took it that his proposal with regard to paragraph 39 was acceptable to the Commission.

5. *It was so decided.*

6. **Mr. Apter** (Israel) proposed that a new paragraph be inserted immediately following paragraph 40 to reflect the fact that the Commission had confirmed, in the context of article 3(2), that it would follow its usual practice of notifying member States of new instruments or amendments to instruments. Since that understanding was not explicitly stated in the convention itself, it should be reflected in the session report. He suggested that the paragraph be worded “It was confirmed that, in accordance with usual practice, the UNCITRAL secretariat shall notify all States of a revision to the Rules and the date until which parties to the Convention can make a declaration in accordance with article 3(2)”.

7. **The Chair** said that the proposed text suggested that the secretariat was obliged to notify member States of the

date until which parties to the convention could make a declaration under article 3(2). In order to avoid such an understanding, he proposed that the text be amended to read “It was confirmed that the UNCITRAL secretariat would follow its usual practice of notifying all States of the revision of the Rules.”

8. *It was so decided.*

9. **Mr. Castello** (United States of America) proposed that, in paragraph 50, the phrase “it was said that ‘modifications’ to the transparency convention would no longer be possible” be replaced with the phrase “it was said that ‘modifications’ of a reservation to the transparency convention would no longer be an appropriate term” in order to clarify that the modifications referred to were not modifications of the convention itself but rather modifications of a reservation to the convention, and that modifications were possible but would be treated either as a new reservation or the withdrawal of a reservation, as the paragraph indeed went on to state.

10. *It was so decided.*

11. **Mr. Spelliscy** (Canada) pointed out that, since paragraph 53 of the document was to be replaced with paragraphs 12-20 of document A/CN.9/XLVII/CRP.1/Add.2, which dealt with the consideration of references to the modification of reservations, the words “subject to further consideration of the deletion of references to modifications to reservations” in paragraph 59 would no longer reflect the order of those discussions and should therefore be adjusted.

12. **The Chair** said he took it that the Commission wished the secretariat to make the necessary adjustments to that paragraph.

13. *It was so decided.*

14. *Document A/CN.9/XLVII/CRP.1/Add.1, as orally amended, was adopted.*

*The meeting was suspended at 3.15 p.m. and resumed at 3.30 p.m.*

15. **The Chair** drew attention to document A/CN.9/XLVII/CRP.1/Add.2.

16. **Mr. Castello** (United States of America), referring to paragraph 19, recalled that article 4(6) had been revised to remove duplicative language, rather than deleted; the text that had been revised, itself a proposed amendment of the original text contained in document A/CN.9/812, was set out in paragraph 51 of document A/CN.9/XLVII/CRP.1/Add.1. He therefore proposed that the words “to delete article 4(6) as contained in paragraph 5 of document A/CN.9/812, as

duplicative with that language” be amended to read “to revise article 4(6) as contained in paragraph 51 of document A/CN.9/XLVII/CRP.1/Add.1 to eliminate duplicative language in that article”.

17. *It was so decided.*

18. *Document A/CN.9/XLVII/CRP.1/Add.2, as orally amended, was adopted.*

19. **The Chair** drew attention to document A/CN.9/XLVII/CRP.2, which contained the text of the draft convention on transparency in treaty-based investor-State arbitration as approved by the Commission.

20. **Mr. Castello** (United States of America) pointed out that the text of article 2(5) as approved, as reflected in paragraphs 24 and 26 of document A/CN.9/XLVII/CRP.1/Add.1, should include the words “seek to” before the word “apply”. It appeared that those words had been accidentally omitted.

21. *Document A/CN.9/XLVII/CRP.2, as orally amended, was adopted.*

*The discussion covered in the summary record ended at 3.45 p.m.*

**Summary record (partial) of the 993rd meeting (closed)**  
**Held at Headquarters, New York, on Monday, 14 July 2014, at 10 a.m.**

[A/CN.9/SR.993]

*Chairperson:* Mr. Choong-hee HAHN (Republic of Korea)

*The discussion covered in the summary record began at noon.*

**Planned and possible future work (continued)**

(A/CN.9/807, 811, 815, 816 and 819-823)

1. **Ms. Nicholas** (International Trade Law Division), drawing attention to documents A/CN.9/807 and A/CN.9/816, said that the Commission was invited to consider a number of key issues in relation to its future work, including the planning of work on legislative development and the use of formal and informal working methods; the question of whether the Commission would have sufficient resources to fund all of the activities that it wished to pursue; and activities to support the adoption and use of UNCITRAL texts.

2. She recalled that the Commission, at its current session, had already reviewed all but one of the eight topics identified as possible areas of future legislative activity, namely public-private partnerships, which had been the subject of preparatory work by the secretariat and two colloquiums on possible future work in that area (A/CN.9/819-821). The most recent colloquium, in recommending the development of a legislative text on public-private partnerships, had emphasized the importance of undertaking that project using formal working methods in the interests of inclusiveness and multilingualism.

3. If formal methods were used to carry out work on each of the eight topics identified, current resources were unlikely to suffice to cover that work. The Commission might therefore wish to select only some of those topics, prioritizing among them on the basis of work already commenced by the working groups, or decide that no new topics should be taken up for the time being. In that regard, she recalled the tests that the Commission had set in order to decide whether a topic should be taken up (A/CN.9/807, paragraph 24), and the emphasis placed on the need for precision in defining the mandates of the working groups. For each of the topics taken up, the Commission would have to determine how much conference time would be needed and the extent to which it would use informal working methods, bearing in mind the implications of those decisions with regard to resource allocation and the extent of future legislative development. In that regard, it should also take into account that, while in theory 16 weeks of conference time were available, it might be difficult to extend the fourteen-week allotment imposed during the 2012-2013 biennium for all sessions of the Commission and its working groups. Since the question of formal resource requirements would become an ongoing issue for the Commission as it received requests to take up new topics, the Commission could also request the working

groups to regularly examine and report on their progress and needs with regard to conference time, and could consider the possibility of reviewing ongoing work on the basis of the tests that applied to future work.

4. Drawing attention to possible options for addressing insufficient conference time for legislative development in the future (A/CN.9/807, paragraph 29), she emphasized that a number of those options had significant resource implications; for example, if a more flexible approach was adopted with respect to the use of conference time, the secretariat would have to service more subject areas at a time when its resources were already stretched; moreover, such an approach would require significantly more planning and could not necessarily be accommodated immediately. The greater use of informal working methods, while enabling working group time to be allocated more efficiently and increasing productivity, would involve the secretariat in legislative development to a greater extent, thus reducing its capacity to engage in technical assistance, coordination and cooperation and other activities. Furthermore, the conference services had indicated on a number of occasions that there was very limited scope for an increase in documentation, including documents submitted for translation, as a result of which it was likely that documents supporting such informal methods could be issued only in English. Indeed, one of the reasons why informal working methods were less transparent and less inclusive than working group sessions was simply because they did not involve the significant issuing of documents in languages other than in English or publication on the UNCITRAL website, though it was possible that some resources could be found for those purposes, at least for publication.

5. In determining the extent to which informal methods were used, it was also recommended that it might be appropriate for working groups to take a pause during certain periods in legislative development, for example, following the adoption of a legislative text, to focus on supporting the enactment and use of that text rather than immediately moving on to another topic in the same subject area. Such a solution would encourage a more flexible approach to the use of formal and informal working methods and thus enable the working groups to make more efficient use of their sessions, although it would again raise the issues of resource implications and the importance of supporting inclusiveness and multilingualism.

6. While legislative development was the most visible element of the Commission's work, the Commission's mandate to further the modernization and harmonization of international trade law was fulfilled not through the issuing of texts but through the enactment and implementation of

those texts. Technical assistance, coordination and cooperation activities played an important role in achieving that objective; however, the Commission's resources to engage in such support activities were both limited and decreasing.

7. In view of the broad range of issues outlined, she suggested that the Commission first consider its approach to legislative development work before discussing other activities.

8. **Mr. Schnabel** (United States of America) said that resource allocation and the need for prioritization of activities were extremely important topics that should be borne in mind throughout all of the Commission's activities. In that regard, the secretariat's summary of the key issues faced was particularly useful. In the coming year, the activities of the working groups should continue to focus on the same six areas of law. Those six areas had already been discussed thoroughly at the Commission's current session and it would be undesirable to reopen those discussions. The working groups should continue to each have two weeks of conference time, while the Commission could be allocated two or three weeks depending on the progress of the work on secured transactions, micro-, small- and medium-sized enterprises and online dispute resolution. Since resources were already stretched, a seventh working group should not be created, nor should the Commission take other steps requiring an increase in resources. In that regard, while informal working methods were a useful tool and might be an appropriate means of advancing work on certain projects, subject to final approval by the Commission, staff resources should not, for the time being, be diverted from technical assistance or support activities to advance additional projects informally.

9. As suggested by the Commission in 2014, it was important to avoid the creation of de facto semi-permanent or permanent working groups dedicated to particular areas of law, as a result of which the members of those working groups might be reluctant to agree to a break in legislative activity through formal working methods for fear of losing their conference time to other projects. It was undesirable for the Commission to decide at its current session what its legislative development plan should be for the next three to five years, as such a decision would preclude the possibility of commencing work in new areas that were not currently being considered by the Commission. While his delegation welcomed the useful information provided with regard to technical assistance and support activities (A/CN.9/816), those activities could be reviewed at a later stage.

10. With regard to public-private partnerships, he welcomed the secretariat's extensive efforts to fulfil the Commission's request, in 2013, that the secretariat carry out further work to define the scope of any possible future project on that subject. However, he expressed concern that the proposed scope might be too broad; 15 topics had been identified as the main issues to be considered, and other issues could arise. Such a project might therefore develop into an extensive undertaking lasting several years, given

that each of those topics, even the definition of "public-private partnership", could be the subject of extensive debate. In view of that eventuality, the work already being carried out in that area by other organizations and the availability of a number of high-quality instruments relating to privately financed infrastructure projects, it was not appropriate to dedicate a working group to the topic at the present stage.

11. **Mr. Schöll** (Switzerland) said that it would be advisable, in planning future work, to confirm the mandates of the working groups. However, since ongoing work in a number of areas was expected to be concluded in 2015 and a number of texts submitted to the Commission for its consideration, the Commission's forty-eighth session was likely to be long, and it was therefore unlikely that conference time could be spared for other projects. Moreover, he agreed with the view that it would be preferable not to identify new projects for implementation until the overall situation with regard to the Commission's work was reviewed at that session and a decision taken with regard to the allocation of conference time.

12. With respect to international contract law, he recalled that the Commission, at its forty-sixth session, had specifically requested the secretariat to organize a colloquium to celebrate the thirty-fifth anniversary of the United Nations Convention on Contracts for the International Sale of Goods, to take place on a date after the forty-seventh Commission session, yet it appeared that document A/CN.9/807 made no reference to a colloquium as such. It was important that that colloquium should take place, since it would cover not only issues relating directly to the Convention but also a wide range of related topics.

13. **Ms. Sabo** (Canada), expressing support for the comments made by the representatives of the United States and Switzerland, said that her delegation strongly opposed the creation of a seventh working group, and that it might even be wise, as current projects came to a close in 2015, for the Commission to reduce the number of working groups to five in view of the resource constraints faced not only by the Commission but also by its member States, which might not have the resources to participate in those working groups despite their interest in the proposed projects. Her delegation endorsed the decisions already taken with respect to the current work of the working groups, and greatly appreciated the secretariat's comprehensive overview of the Commission's work programme. It would be desirable for the Commission to continue to review its work programme in the same way every year.

14. Informal working methods were a useful means of carrying out preparatory work on topics that might be taken up by working groups in the future but were not yet ready for consideration. In that regard, it would be helpful for the Commission to give the secretariat guidance as to how such work should be conducted. Since the schedule of the Commission and working groups was full for the next year and a number of areas of future work had already been identified, delegations having indicated to some extent the



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priority that they accorded to those topics, the Commission should not decide until its forty-eighth session which topics would next be taken up. *The meeting rose at 1 p.m.*

**Summary record (partial) of the 994th meeting (closed)**  
**Held at Headquarters, New York, on Monday, 14 July 2014, at 3 p.m.**

[A/CN.9/SR.994]

*Chairperson:* Mr. Choong-hee HAHN (Republic of Korea)

*The meeting was called to order at 3.05 p.m.*

**Planned and possible future work** (*continued*)  
(A/CN.9/807, 811, 815, 816 and 819-823)

1. **Mr. Chan Wah Teck** (Singapore) said it was unfortunate that the Commission had not dealt earlier in its session — before the session report was considered or the mandates of the working groups were reaffirmed — with the issues raised, given the gravity of the situation. He agreed that the Commission, having reaffirmed the mandates of the working groups, should not reopen those discussions; however, it now had little room for manoeuvre. No resources remained for the creation of a seventh working group, and it was unlikely that such resources could be obtained even if such a step was supported. UNCITRAL could not cover all of the areas requested of it; it would need to prioritize among them. Resource constraints and the ever-growing number of requests for the inclusion of new subject areas on the Commission's agenda were matters that had been discussed by the Sixth Committee of the General Assembly for several years, and raised sensitive issues that could not be avoided if progress was to be made. At the root of those problems lay the insistence of some delegations that certain subjects be pursued, which placed the secretariat under pressure to undertake an increasing range of work, and the way in which the Commission had dealt with its working groups.

2. The Commission had erred in designating subject areas for those groups at the time of their establishment in that the members of the groups considered themselves responsible for continuing work on those subjects. Despite the fact that the Commission had subsequently decided to designate the working groups by numbers rather than portfolios so that the groups could work on any topic assigned to them, in practice the working groups had been left to determine their own mandates, which were consequently framed in the broadest possible terms and sometimes were changed, as were the outcomes of the groups' work; for example, a project conceived with a view to producing a hard-law text sometimes resulted in a soft-law instrument such as a legislative guide.

3. The working groups should not be left to determine their own mandates, nor should they be allowed to perpetuate themselves by seeking further work in the same subject area once their original mandate was exhausted. Instead, the mandate of each working group, including the outcome of that mandate and possibly a time frame for implementation, should be precisely defined by the Commission on the basis of secretariat advice and recommendations resulting from

thorough research, including consultation with experts, and taking into account the suggestions of member States. If a working group was unable to fulfil the mandate assigned to it within the time allocated for that purpose, it should be instructed to cease its work and to undertake a new project that was likely to have an outcome that would benefit international trade; in that regard, it should be borne in mind that soft-law instruments were less desirable than hard-law instruments as they were less effective in harmonizing international trade law. Since the mandates of the working groups had already been confirmed, it would not be possible to implement such an approach in the coming year, but the lessons learned could be applied in the following years.

4. **The Chair** recalled that, when the Commission had reviewed the progress reports of its working groups and discussed some of the future work of those groups earlier in the session, it had been pointed out that the Commission would have an opportunity to examine how that future work would fit into the broader discussion of planned and possible future work. Therefore, no final decision would be taken until the Commission had comprehensively examined the current agenda item. There was no question that the Commission would take each final decision with regard to the subject areas to be taken up by each working group and the duration of each project.

5. **Mr. Schöfisch** (Germany) endorsed the view that a seventh working group should not be created, in view of the resource constraints faced not only by the Commission but also by member States, and that consideration should be given to the possibility of reducing the number of working groups to five in the future. In the interests of transparency, however, the primary method of work should continue to be formal, although informal working methods were necessary in the preparation of meetings. His delegation supported greater flexibility with regard to the allocation of conference time.

6. As had been mentioned, it was not always easy to define the mandate of a working group precisely. For example, the preparation of guidelines for online dispute resolution providers and platforms had been identified as a possible future legislative activity for Working Group III (A/CN.9/807), yet it was his delegation's understanding that that subject was already covered by the Group's existing mandate. He concurred that, since the working groups' mandates had already been decided on, they should not be reviewed until the Commission's

next session, nor should any other proposals be considered until that time.

7. **Ms. Gloaguen** (France), endorsing the comments made by the representative of Singapore, said that her delegation also opposed the creation of a seventh working group and supported the comments made by the representative of Germany with regard to the mandates of the working groups and the continued use of formal working methods as a means of ensuring transparency and equal opportunities for all members of working groups to convey their views.

8. Welcoming the intensive work carried out by the secretariat in the area of public-private partnerships, an area of great importance for all regions of the world, she said that the Commission should entrust Working Group VI with the mandate to begin work on that issue once it had concluded its current work in 2015.

9. **Mr. Sorieul** (Secretary of the Commission) said it should not be assumed that Working Group VI would be available to take up a new project in 2015; indeed, it was unclear whether that Working Group would continue to exist. It was unwise to wait to see how the work of the working groups progressed, since a working group, on concluding a project, might find itself without a new mandate. It was therefore necessary to plan ahead and prioritize by selecting specific subjects for consideration, even if that meant requesting a working group to suspend or discontinue some activities in order to reallocate conference time for work on another subject.

10. **Mr. Marani** (Argentina) concurred with the view that, in view of the limited resources of the secretariat and member States of the Commission, the Commission was not in a position to establish a new working group or to undertake all proposed projects and should therefore prioritize specific issues among the subject areas identified, on the basis of informal consultations and discussions at each Commission session, identifying those areas of greatest interest and determining the availability of financial and staff resources and conference time to cover those areas. That approach would facilitate progress and decision-making. In addition, informal methods could be useful in examining the feasibility of specific proposed projects. Such methods did not necessarily limit transparency.

11. **Mr. Maradiaga** (Honduras), endorsing the views expressed with regard to the working groups, particularly with respect to resource limitations, said that an assessment should be conducted with a view to reducing the number of working groups to five, and that a flexible approach should be taken with respect to conference time allocated to working group meetings. Care should be taken to identify specific issues for consideration, and the development of hard-law instruments should be given precedence over that of soft-law instruments.

12. **Ms. Constantino** (Panama) said that, since resources were scarce, it would be best to use available

funds to complete the work already in progress and to identify specific issues of most relevance for future consideration, rather than establishing an additional working group. Her delegation did not support the proposal to reduce the number of working groups to five.

13. **Mr. Misonne** (Observer for Belgium), supported by **Ms. Gloaguen** (France) and **Ms. Malaguti** (Italy), proposed that, if future work in the area of electronic commerce was to be considered, Working Group IV address the issues of electronic transfers, identity management and trust services. As a means of preparing for that work, he requested the Commission to organize an international colloquium that would facilitate the compilation of information and the exchange of views on those subjects.

14. In view of the limited resources of the working groups, Belgium stood ready to participate in the organization of other such colloquiums, which encouraged the active participation of member States and international organizations and were a means of accommodating and pursuing worthwhile proposals such as that submitted by Canada with regard to cloud computing (A/CN.9/823).

15. **Mr. Decker** (Observer for the European Union), referring to the comments made with regard to Working Group III, said that the topic identified as possible future legislative activity for that Working Group indeed already fell within the Group's existing mandate, having been an integral part of its deliberations on the draft procedural rules on online dispute resolution for cross-border electronic commerce transactions, which had included discussion of the future elaboration of minimum quality standards with respect to actors involved in the online dispute resolution system. It was therefore unnecessary for the Commission to entrust the Working Group with a new mandate to prepare guidelines for online dispute resolution providers and platforms.

16. **Mr. Leinonen** (Observer for Finland) expressed support for the emerging consensus that a seventh working group should not be created. It was possible that in 2015 or 2016 the Commission would be in a position to consider the possibility of reducing the number of working groups, which would be a wise step in view of resource constraints. He concurred that the creation of permanent or semi-permanent working groups should be avoided, and that it was important that control over the activities of the working groups remained with the Commission and not with the working groups themselves.

17. While his delegation supported the use of formal working methods, a flexible approach to working methods was useful provided that it was considered on a case-by-case basis, according to the specific topics considered by the working groups and taking into account the need to promote transparency and to ensure

that the Commission retained control over decisions with regard to those methods.

18. The question of conference time allocation should be reviewed every year on the basis of the time that was needed for, and could feasibly be devoted to, the consideration of each specific topic. It might be appropriate in some cases to establish a longer mandate for a given working group, provided that that mandate was provisional and could be reviewed by the Commission at each of its sessions. That would benefit both the working groups and delegations in terms of the predictability of their work schedule. While it might also be helpful to establish fixed mandates, planned outcomes and deadlines in some cases, it was uncertain whether such an approach was even possible in practical terms. Instead, it might be wise to review a project at its midpoint, at which the working group in question would be in a better position to determine what the outcome of that project should be.

19. **Mr. Chan Wah Teck** (Singapore) said that his delegation strongly supported the use of formal working methods as a means of ensuring transparency and equal opportunities for all member States to participate, which was in line with the Commission's objective of giving developing countries a voice in the development of rules contributing to the harmonization of international trade law.

20. However, the key issue was not whether working methods should be formal or informal but, rather, the nature of the work carried out by the working groups. Since working groups were very expensive undertakings, requiring the participation of expert delegates who had to travel to New York or Vienna to attend their meetings, they should be convened only for the most important work. Work on soft-law instruments relating to legal instruments deliberated on and adopted by the working groups could be carried out outside the working group in question, by the secretariat in collaboration with the members of the Group, United Nations and other experts and academics who had studied those instruments, and the results of that work submitted to the Commission for final approval.

21. Given that at least two subject areas had been identified as being of high priority, he wondered whether it would be possible for the secretariat to advise the Commission as to the precise stage of work of each of the working groups with a view to reassigning one or more groups to those areas; if a working group was as yet engaged only in preliminary discussions on a project already assigned to it, the Commission should have the possibility of suspending that project to make way for a topic of higher priority until the time and resources were available for the original project to be resumed. Such an approach would alleviate the problem of resource scarcity.

22. **Mr. Won** (Republic of Korea) seconded the views expressed with regard to the inadvisability of

establishing a new working group, the need to identify specific areas for consideration and the importance of formal working methods in supporting inclusiveness and transparency and fostering cooperation, although efforts to apply informal working methods in view of their obvious benefits were welcomed. More time would be needed for the Commission to discuss the planning and organization of its future work. In that regard, it was important to bear in mind that it fell to the Commission, rather than the secretariat, to overcome the challenges faced with regard to the future work of its working groups.

23. **Mr. Schnabel** (United States of America), referring to the proposal by the representative of Belgium to organize a colloquium to discuss issues related to electronic commerce, said that such a colloquium could helpfully explore all of the various topics that had been raised with respect to electronic commerce, including mobile payments, single window facilities and cloud computing, with a view to determining which were the most promising areas for future work.

24. With regard to the comments made concerning the mandate of Working Group III, it was his understanding that that mandate had been established in 2010 and that the Working Group had itself not yet come to a decision as to what further work it would recommend. He therefore sought the secretariat's clarification in that regard.

25. **Mr. Sorieul** (Secretary of the Commission) said it was his recollection that the Commission, at its forty-fourth and forty-fifth sessions, had addressed the possible drafting of guidelines or other explanatory material as part of that mandate.

26. The Commission had already faced the issues raised with regard to future work at its forty-sixth session, but regrettably had not been able to reach a conclusion as to how those issues should be addressed and was unlikely to be able to do so at its present session. It was indeed the role of the Commission rather than the secretariat to establish policies and priorities with regard to the work of its working groups and the subject areas they dealt with, and the purpose of the progress reports of the working groups was to assist the Commission in that task. It would be helpful if the Commission could provide more guidance in terms of how tasks and resources should be distributed among the working groups by taking a decision in that regard. Given the general agreement that it would be undesirable to create a new working group or to make greater use of informal working methods, and the fact that neither working group capacity nor resources would be available until 2015, it would clearly not be possible for the Commission to work on any additional topics, or to organize the planned colloquium to celebrate the thirty-fifth anniversary of the United Nations Convention on Contracts for the International Sale of Goods, before 2015. If there was sufficient support for

the proposed work on public-private partnerships, it might be possible to accommodate that work in 2015 if one of the working groups became available.

27. **Mr. Lemay** (International Trade Law Division), confirming that the preparation of guidelines for online dispute providers and platforms was encompassed by the existing mandate of Working Group III, pointed out that the guidelines were not intended as a guide to interpretation of the draft procedural rules on online dispute resolution for cross-border electronic commerce transactions or as the final outcome of the work of that Working Group, but rather as part of that final outcome, i.e. as part of an online dispute resolution framework, as indicated in the preamble to the draft rules.

28. **Ms. Sabo** (Canada) said that, contrary to the comments made to the effect that the Commission had been unable to establish priorities with regard to its work, it was her delegation's understanding that the Commission had clearly defined its current and its future priorities with respect to the subject areas examined by its working groups and would review and refine those priorities at its next session.

29. **Mr. Chan Wah Teck** (Singapore), referring to earlier comments regarding the respective roles of the Commission and the secretariat, said that while it indeed fell to the Commission to decide whether to affirm, reaffirm or alter the mandates of its working groups, the Commission relied on the information and advice provided by the secretariat to arrive at considered decisions, particularly since many of the Commission members had roles and responsibilities other than being part of the Commission and were unaware of all of the areas in which the Commission operated. The secretariat was in the best position not only to report on the work of the working groups but also to provide an overview of the precise stage that they had reached in fulfilling their respective mandates, and should therefore make recommendations on that basis, even as to whether a working group should continue to exist.

30. **Ms. Malaguti** (Italy) said that the Commission's schedule of work and short-term priorities beyond existing projects seemed clear. With regard to long-term planning and prioritization, she expressed support for the comments made by the representative of Singapore. In order to resolve the current situation, rather than putting pressure on the secretariat, which had neither the power nor the means to make recommendations and could even be blamed for making the wrong recommendations, the Commission should itself consider proposals with regard to possible ways forward.

31. **Mr. Mirza** (Pakistan) said that the comments made by the representative of Singapore rightly highlighted the constraints faced by the delegations of many developing countries, which might not be in a position to send delegates to cover all meetings of the Commission and its working groups. The secretariat

should therefore make more information available with respect to the work of those groups.

32. **Mr. Sorieul** (Secretary of the Commission) said that the secretariat did not have the power to issue specific recommendations with regard to whether working groups should continue their work, receive new mandates or cease to operate. When requests were made of the secretariat, it was obliged to seek the Commission's decision with respect to those requests. The documentation prepared by the secretariat described in detail the precise nature of the issues raised by the working groups.

33. **The Chair** said that it remained for the Commission to consider how the issue of public-private partnerships should be further addressed. Since that issue could not currently be referred to a working group owing to resource constraints, and a time frame for its eventual consideration could not be established, he proposed that informal working methods be used to prepare that topic further for eventual consideration by a working group. On a more general matter, in view of the uncertainty as to the overall status of work of the working groups and whether they were fulfilling or had exhausted their mandates, that status should be reviewed.

34. **Ms. Sabo** (Canada) expressed concern that the Commission had been wrongly understood to have decided to assign the proposed project on public-private partnerships to a working group when a group became available, whereas at least one delegation had explicitly opposed such a decision and her own delegation aligned itself with that position. The Commission should not undertake the proposed project because it was not feasible to harmonize the multiplicity of existing practices in that area. A decision as to whether the topic should be assigned to a working group in the future should be taken at a future session of the Commission.

35. **The Chair** confirmed that no decision would yet be taken with regard to future topics to be assigned to a working group, and that the decision with regard to public-private partnerships would depend on the research and informal activities carried out in the meantime.

36. **Mr. Sorieul** (Secretary of the Commission) sought clarification as to how the Commission wished the secretariat to proceed in the coming year with regard to the issue of public-private partnerships given that, while the most recent colloquium held on that subject had specifically recommended that the Commission provide a mandate for the development of a model law and accompanying guide to enactment as early as reasonably possible, and that that project be undertaken using formal working methods, there had been little discussion of the issue so far during the Commission's present session and there appeared to be conflicting views as to whether the project should be taken up.

37. **Mr. Schnabel** (United States of America) said that although the colloquium and the informal work carried out in the past year had been helpful in defining the scope of the issues raised, further work over the course of the coming year was not necessary. While his delegation respected the expert views and recommendations emerging from the colloquium, it was the role of the Commission not to rubber-stamp those recommendations but to consider them in the same way in which it considered the recommendations of the working groups. Should the Commission choose at a future session to review the question of whether to allocate resources to the topic, the documentation before the Commission presented the issue at a level of detail sufficient to facilitate such a decision.

38. **Ms. Sabo** (Canada), endorsing those comments, said that members of the Commission and observer States should be free to, and in fact should be encouraged to, come to their own decisions about the policy matters of the Commission, and in that respect her delegation was firmly of the view that the topic of public-private partnerships did not lend itself to harmonization, although the situation might well change in 5 to 10 years' time, and should therefore not be pursued at the present time. In view of the priorities just established, the secretariat's limited and stretched resources would be much better devoted to preparing some of the topics that had been identified as likely next areas of work for the existing working groups.

39. **Ms. Gloaguen** (France) said that, since many delegations had already expressed the importance that they accorded to the issue of public-private partnerships and their wish that a working group be entrusted with the mandate to pursue that work, it would be desirable for the Commission to address the issue in 2015.

40. **Ms. Malaguti** (Italy), seconding that view, said that consideration of the topic should be neither abandoned nor indefinitely postponed, given its importance for developing countries in particular and the interest in the commercial sector in harmonizing practice in that area, although she recognized that the topic presented a wide range of issues.

41. **Mr. Schöll** (Switzerland), seconding the statements made by the representatives of Canada and the United States of America with respect to the issue of public-private partnerships, said that the Commission should return to the issue in 2015, particularly in view of the preparatory work already undertaken by the secretariat.

42. **Mr. Mirza** (Pakistan) said that his delegation strongly supported the commencement of formal work on public-private partnerships as a means of

encouraging the greater participation of developing countries. Another means of encouraging and facilitating their participation in the work of the working groups in general would be to introduce the use of videoconferencing.

43. **Ms. Sabo** (Canada), clarifying her earlier remarks, said that her delegation did not wish the Commission to abandon the proposed project, but rather had understood that the topic would be before the Commission again in 2015 for consideration and a decision as to how to proceed. The documentation already available sufficed for that purpose. However, if the project was indeed ready to be referred to a working group, as indicated by the results of the colloquium held on that topic, there was no need to devote further informal work to it in the course of the coming year.

44. **Mr. Schöfisch** (Germany) agreed that the topic should be taken up in 2015, for the reasons already given by other delegations, according to the status of work of the working groups at that time.

45. **Ms. Nicholas** (International Trade Law Division) said that the conclusion of the recent colloquium on public-private partnerships had been that the topic was as ready as it reasonably could be for consideration by a working group. That did not mean that all issues were settled; addressing the more complex issues was the preliminary task of a working group in commencing a new project. The secretariat was keeping abreast of the topic and encouraging experts who had participated in the colloquium to continue to contribute their views on the various issues that had been discussed, as well as seeking to engage other relevant actors in those discussions. The work conducted in that area to date had been carried out in parallel with work on all of the other topics that the Commission had been examining, without any negative impact on those other projects in terms of secretariat time or resources. Provided that there was no change in the current level of those resources or in the secretariat's activities, or in the work of the working groups, the same background research on public-private partnerships could continue without detriment to other work.

46. **The Chair** said that, on the basis of the comments made, the Commission would review the issue at its next session and the secretariat would in the meantime continue to examine the issues raised and monitor developments in the subject area, gathering information informally, in readiness for the Commission's next session, at which it could present an update if necessary.

*The discussion covered in the summary record ended at 5.30 p.m.*

**Summary record (partial) of the 995th meeting (closed)**  
**Held at Headquarters, New York, on Wednesday, 16 July 2014, at 10 a.m.**

[A/CN.9/SR.995]

*Chairperson:* Mr. Choong-hee HAHN (Republic of Korea)

*The discussion covered in the summary record began at 10.30 a.m.*

**Planned and possible future work (continued)**  
**(A/CN.9/807, 811, 815, 816 and 819-822)**

1. **Ms. Nicholas** (International Trade Law Division) recalled that the Commission had already considered earlier in its session the current and possible future support activities outlined in documents A/CN.9/807 and 816 and the ongoing difficulty in securing resources for support activities in general. The Commission was invited to consider possible means of enhancing the use of existing resources as suggested in document A/CN.9/816 and the possibility of requesting the secretariat to establish a more structured programme of support activities, including the examination of possible means of delivering such a programme and ways in which extrabudgetary resources could be obtained.

2. Among other constraints, it was clear that resources were insufficient to expand and update the UNCITRAL website in order to publish additional materials needed as part of support activities, particularly since the Commission already faced limitations with respect to the production of documentation in all six United Nations languages, which was particularly important in the preparation of legislative development activities. The availability of both documentation and website material in all six languages was important in ensuring inclusiveness and transparency.

3. **Ms. Sabo** (Canada) said that, while legislative development should take priority, her delegation welcomed the support activities undertaken and encouraged the secretariat to continue to pursue such activities within existing resources, as in previous years. In view of the current economic climate, requests for additional resources to fund support activities, despite increasing demand for such activities, should not be supported. However, she strongly encouraged the secretariat to continue to seek opportunities to work and pool resources with relevant organizations, including the International Institute for the Unification of Private Law (Unidroit) and the Hague Conference on Private International Law, to the extent that common subject areas were identified.

4. **Mr. Schnabel** (United States of America) said that the secretariat's suggestions with respect to new and creative ways to facilitate the promotion of UNCITRAL instruments and to increase the resources available to the secretariat should be pursued further, in particular encouraging other organizations, including non-governmental organizations, to play a greater role in support activities and using working groups as resources to identify appropriate expertise. Some members of working group delegations had already initiated useful dialogue with a number of countries to support those countries' efforts to implement UNCITRAL texts. Even if such activities could not be formalized, they could at least be explored further.

5. **Mr. Marani** (Argentina) said that it was important to ensure that the secretariat had a mandate to explore alternatives for obtaining the resources necessary to finance technical assistance. Such assistance was a key element in the implementation of UNCITRAL texts, particularly with respect to developing countries.

6. **Mr. Ghia** (Observer for the International Insolvency Institute) said that it would be useful to develop cooperation between his organization and UNCITRAL in the implementation of support activities both in general and at the regional and country levels, pointing out in that regard that the International Insolvency Institute was present in more than 40 countries.

7. **Mr. Schöll** (Switzerland) said that, in considering the extent to which the secretariat should actively seek extrabudgetary resources, it should be borne in mind that too high a level of such funding might make it difficult for the Commission to accomplish its core mandate. Moreover, the Commission should not expect significant levels of unconditional funding by other organizations, since such funding might be difficult to obtain.

8. **The Chair** said that while he understood that point, in general terms more active involvement in technical assistance and voluntary contributions could be expected since the more dynamic involvement of States in encouraging the promotion of UNCITRAL work at the national, regional and global levels was needed.

*The discussion covered in the summary record ended at 10.50 a.m.*





## II. BIBLIOGRAPHY OF RECENT WRITINGS RELATED TO THE WORK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW\* (A/CN.9/805)

[Original: English]

### Contents

I. General	.....
II. International sale of goods	.....
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### I. General

[Summary of] ‘Enabling environment for rule-based business, investment and trade,’ side event in conjunction with the eighth session of the Open Working Group on Sustainable Development Goals (New York, 3-7 February 2014).

Bazinas, S. V. Tribute to Boris Kozolchyk at the occasion of the 30th anniversary of the Arizona journal of international and comparative law. *Arizona journal of international and comparative law* (Tucson, Ariz.) 30:1:xiii-xiv, 2013.

Bizonce, R. O. and F. Ferrand. Lois modèles et traditions nationales. *Civil procedure review* (München) 3:1:52-207, 2012.

Bloomsbury, A. L. International Section’s third mission and the Committee on International Contract and Commercial Law: monitoring development of international law. *New York international chapter news* (New York) 18:1:27-32, 2013.

Castellani, L. G. Current situation and legal agenda of international business transaction. *青山法学論集 = Aoyama law review* (Tokyo) 55:3:115-126, 2013. In Japanese.

\_\_\_\_\_. UNCITRAL と日本との関係について —なぜ、より密接な関係が必要なのか. *New business law* (Tokyo) 1006:1-1, 2013. Translation of title: Relationship between UNCITRAL and Japan: why a closer relationship is needed.

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\* Current and consolidated bibliographies with detailed annotations are available online at [www.uncitral.org/uncitral/publications/bibliography.html](http://www.uncitral.org/uncitral/publications/bibliography.html). Case law on United Nations Commission on International Trade Law (UNCITRAL) texts (CLOUT) and bibliographical references thereto are contained in the document series A/CN.9/SER.C/-.

- Cohen, E. S. Constructing power through law: private law pluralism and harmonization in the global political economy. *Review of international political economy* (Oxford, U.K.) 15:5:770-799, 2008.
- González, J. A. El derecho uniforme internacional, Comisión de Asuntos Americanos Unión Internacional del Notariado, Lima, 26-28 de marzo de 2009.
- Goode, R. M. and others. Transnational commercial law: international instruments and commentary. 2nd ed. Oxford, Oxford University Press, 2012. 1072 p.
- Halliday, T. C. and others. Who governs?: Delegations and delegates in global trade lawmaking. *Regulation & governance* (Berlin) 7:3:279-298, 2013.
- Jehl, J. Commission des Nations Unies pour le droit commercial international: nouveaux textes. *Semaine juridique édition générale* (Paris) 36:1585, 2013.
- Karton, J. and S. Wynne. Canadian courts and uniform interpretation: an empirical reality check. *Uniform law review = Revue de droit uniforme* (Roma) 18:2:281-312, 2013.
- Modernisation of international commercial law needed in the Pacific says UN official. *newSPLash* (Canberra) 7:17, 2013.
- Mooney, L. Promoting the rule of law: a practitioner's guide to key issues and developments. Chicago, Ill., American Bar Association, 2013. 303 p. Selected contents: How private international law fosters the rule of law / D. P. Stewart, Ch. 5 -- The role of UNCITRAL in fostering the rule of law / S. Musayeva and R. Sorieul, Ch. 6.
- Ngoumtsa Anou, G. Droit OHADA et conflits de lois. Paris, LGDJ, Lextenso éditions, 2013. 456 p.
- Oh, S. G. KLRI-UNCITRAL joint research: perspectives and trends [VIII], Micro Finance/ Micro Business 에 관한 UNCITRAL 에서의 논의 분석. Seoul, Korea Legislation Research Institute, 2013. 112 p. Translation of title: Analysis of discussion on micro finance and micro business at UNCITRAL.
- Opertti Badan, D. Conflit de lois et droit uniforme dans le droit international privé contemporain: dilemme ou convergence ? *Recueil des cours: Académie de Droit International = Collected courses of the Hague Academy of International Law* (Leiden, The Netherlands) 359:9-86, 2012.
- Ravillon, L. Emergence d'un droit international/régional des affaires: chronique des sources informelles du droit des affaires internationales = Emergence of an international/regional business law. *Revue de droit des affaires internationales = International business law journal* (Paris) 6:637-656, 2013.
- Robilant di, A. Genealogies of soft law. *Scandinavian studies in law* (Stockholm) 58:217-268, 2013.
- Rodríguez Fernández, M. Introducción al derecho comercial internacional. Bogotá, Universidad Externado de Colombia, 2009. 512 p.
- Schöll, M. Statement by Michael Schöll, Chairman of the 46th Session of the United Nations Commission on International Trade Law (Friday, 7th February 2014) [at] the eighth session of the General Assembly Open Working Group on Sustainable Development Goals (3-7 February 2014).
- Setting the global standards for international trade (UNCITRAL-RCAP): United Nations Commission on International Trade Law Regional Centre for Asia and the Pacific. *IFEZ journal* (Incheon, Republic of Korea) 53:9-10:30-31, 2013. In English and Korean.
- Sikirić, H. Remarks of the Chair of UNCITRAL, Mr. Hrvoje Sikirić, as moderator of the Panel II [of the United Nations Peacebuilding Commission and the United Nations Global Compact conference] 'Business for Peacebuilding,' New York: 25 June 2013.

- \_\_\_\_\_. Statement by the Chair of the United Nations Commission on International Trade Law (UNCITRAL) at its forty-fifth session, Mr. Hrvoje Sikirić, at the [General Assembly high-level] thematic debate meeting ‘Entrepreneurship [and] Development’, held on 26 June 2013.
- Son, H. and others. KLRI-UNCITRAL joint research: perspectives and trends [I], 종합보고서, summary report. Seoul, Korea Legislation Research Institute, 2013. 192 p. In Korean and English.
- Sono, H. and others. 私法統一の現状と課題. Sapporo, Japan, NBL, 2013. 97 p. Translation of title: Status quo and challenges of unification of private law. NBL No. 144.
- Sono, H. and N. Takasugi. 私法統一の現状と課題 (6) ハーグ国際私法会議・Unidroit・UNCITRAL. *New business law* (Tokyo) 1006:52-62, 2013. Translation of title: Current state of the unification of private law: vol. 6. Hague Conference on Private International Law, Unidroit, UNCITRAL.
- Subedi, S. P. Textbook international trade and business law. Hanoi, People’s Public Security Publishing House, 2012. 524 p.
- UN Commission on International Trade Law. News from the United Nations Commission on International Trade Law (UNCITRAL): UNCITRAL at the end of 2013. *Uniform law review = Revue de droit uniforme* (Roma) 18:3-4:721-730, 2013.
- United Nations. Recognizing and preventing commercial fraud: indicators of commercial fraud, prepared by the UNCITRAL secretariat. Vienna, United Nations, 2013. 89 p.
- United Nations. Rule of Law Unit. Expanding the UN rule of law agenda: rule-of-law activities that promote economic development. *United Nations Rule of Law: in focus* 2013. Available online at [http://www.unrol.org/article.aspx?article\\_id=183](http://www.unrol.org/article.aspx?article_id=183)
- Zhu, W. 非洲地区一体化进程中的法律一体化. *西亚非洲 = West Asia and Africa* (Beijing) 1:102-115, 2013. Translation of title: The legal integration process of African regional integration.

## II. International sale of goods

- Advantages of applying the United Nations Convention on Contracts for the International Sale of Goods (CISG) in general terms and conditions. *Lorenz & Partners newsletter* (Hong Kong) 102:1-4, August 2012.
- Aksoy, H. C. Status quo bias, CISG and the future of the Common European Sales Law. *European business law review* (London) 24:4:459-465, 2013.
- Allen, T. General principles of international law and the autonomous interpretation of the Convention on Contracts for the International Sale of Goods. *Journal of Islamic State practices in international law* (London) 8:2:91-103, 2012.
- Andersen, C. B. Breaking the mould of scope: unusual usage of the CISG. *Vindobona journal of international commercial law and arbitration* (Vienna) 16:2:145-162, 2012.
- Araujo, N. de and F.I.G. de C. Saldanha. Recent developments and current trends on Brazilian private international law concerning international contracts. *Panorama of Brazilian law* (Rio de Janeiro, Brazil) 1:1:73-83, 2013.
- Asghari Aghmashhdi, F. and M. Ala. Delivery of goods more than provided in the contract (a comparative study in Iranian law, CISG (1980) and English law). *Private law* (Tehran) 19:25-52, 2012. In Persian (Farsi), title translated from the original.

- Bacher, G. The UIA in Ljubljana: negotiating and managing international sales, agency and distributorship contracts. *Juriste international* (Paris) 3:11-12, 2013.
- Baptista, L. O. and others. Harmonising with CISG. *Latin lawyer* (London) 23 October 2012.
- Bilotta, C. Ending the commercial siesta: the shortcomings of European Union Directive 2011/7 on combating late payments in commercial transactions. *Brooklyn journal of international law* (Brooklyn, N.Y.) 38:2:699-727, 2013.
- Bonell, M. J. Model Clauses for the Use of the Unidroit Principles of International Commercial Contracts. *Uniform law review = Revue de droit uniforme* (Roma) 18:3-4:473-489, 2013.
- Bonell, M. J. and O. Lando. Future prospects of the unification of contract law in Europe and worldwide: a dialogue between Michael Joachim Bonell and Ole Lando on the occasion of the seminar in honour of Ole Lando held in Copenhagen on 29 August 2012. *Uniform law review = Revue de droit uniforme* (Roma) 18:1:17-31, 2013.
- Bridge, M. Contract damages under the United Nations Convention for the International Sale of Goods: loss and compensation. *European journal of commercial contract law* (Zutphen, The Netherlands) 4:4:77-90, 2012.
- Castellani, L. G. The adoption of the CISG in Portugal: benefits and perspectives. *Revista eletrónica de direito* (Porto, Portugal) 2, October 2013.
- \_\_\_\_\_. 국제물품매매에 있어 시효기간에 관한 협약 개요. *Korea international trade law journal* (Seoul) 22:1:375-392, 2013. Translation of title: Study of the Convention on the Limitation Period in the International Sale of Goods (New York, 1974), as amended by the Protocol 11 April 1980 (Vienna) (“Limitation Convention (1974/1980)”).
- Castellanos Ruiz, E. El valor de los Incoterms para precisar el juez del lugar de entrega. *Cuadernos de derecho transnacional* (Madrid) 4:2:93-122, 2012.
- Chen, J. 论 CISG 项下国际惯例的效力 – 兼论我国《民法通则》第 142 条的改良. *Journal of international trade* (China) 5: 157-165, 2011. Translation of title: On the legal effect of international usage under the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (“CISG (1980)”) and modification of article 142 of General Principles of Civil Law.
- Chen, L. and Q. Li. CISG 第 39 条第 1 款在德国的适用与解释. *Journal of Soochow University* (China) 5:96-192, 2011. Translation of title: On the application and interpretation of article 39(1) CISG (1980) in Germany.
- Choi, H.-S. 국제물품매매에 관한 유엔시효협약. *Comparative private law* (Seoul) 13:863-911, 2000. Translation of title: Limitation Convention (1974/1980). In Korean with abstract in English.
- CISG Advisory Council. CISG Advisory Council: CISG-AC opinion no. 10: agreed sums payable upon breach of an obligation in CISG contracts. Rapporteur: Dr. Pascal Hachem, Bär & Karrer AG, Zurich, Switzerland. Adopted by the CISG-AC following its 16th meeting in Wellington, New Zealand on 3 August 2012.
- \_\_\_\_\_. CISG Advisory Council: CISG-AC opinion no. 13: inclusion of standard terms under the CISG. Rapporteur: Professor Sieg Eiselen, College of Law, University of South Africa, Pretoria, South Africa. Adopted by the CISG Advisory Council following its 17th meeting, in Villanova, Pennsylvania, USA, on 20 January 2013.
- Clapham, J. Recent trends in commodities arbitration. *Journal of international arbitration* (Alphen aan den Rijn, The Netherlands) 30:6:665-688, 2013.

- Clive, E. Key concepts in uniform and regional private law instruments: an emerging consensus? *Uniform law review = Revue de droit uniforme* (Roma) 18:1:32-49, 2013.
- Competition in international sales law. *European business law review* (London) 24:3:295-406, 2013. Special journal issue. Selected contents: Competition in international sales law: introduction to special issue / J. M. Smits, p. 295-298 — Some realism about a Common European Sales Law / J. H. Dalhuisen, p. 299-318 — The interpretation and fairness of standardized terms: certainty and predictability under the CESL and the CISG compared / N. Kornet, p. 319-339 — Incorporation of standard terms according to the CISG and the CESL: will these competing instruments enhance legal certainty in cross-border sales transactions? / S. A. Kruisinga, p. 341-362 — A psychology of choice of laws / G. Low, p. 363-387 — Promoting uniform sales law / O. Meyer, p. 389-406.
- Dalla Massara, T. Vendita di tradizione romanistica e vendita internazionale: modelli a confronto. *Zbornik pravnog fakulteta sveučilišta u Rijeci* (Rijeka, Croatia) 33:2:599-628, 2012. Translation of title: Sale under the Roman tradition versus international sale: a comparison of models.
- Darankoum, E.S. L'application de la Convention des Nations Unies sur les contrats de vente internationale de marchandises par les arbitres de la chambre de commerce internationale en dehors de la volonté des parties est-elle prévisible? *Revue québécoise de droit international* (Montréal) 17:2:1-32, 2004.
- DiMatteo, L.A. *International contracting: law and practice*. 3rd ed. Alphen aan den Rijn, The Netherlands, Wolters Kluwer Law and Business, 2013. 654 p.
- \_\_\_\_\_. Soft law and the principle of fair and equitable decision making in international contract arbitration. *Chinese journal of comparative law* (Oxford) 1:1-35, 2013.
- Dorđević, M. Конвенција УН о уговорима о међународној продаји робе у српском праву и пракси: искуства и перспективе. *Annals of the Faculty of Law in Belgrade - Belgrade law review* (Belgrade) 2012:2:256-275, 2012. Translation of title: CISG (1980) in Serbian law and practice: current status and perspectives. In Serbian.
- Droese, P.A. B2B Kaufverträge und das GEK: das Ende des CISG? *Internationales Handelsrecht* (München) 13:2:50-60, 2013. Translation of title: B2B contracts and CESL: the end of CISG (1980)?
- Ehlers, A. Establishing a uniform interpretation of the CISG: a case study of Article 74. *Nordic journal of commercial law* (Turku, Finland) 2:2013.
- Emery, C. and J. Salasky. Arbitration and UNCITRAL's sales conventions. *Slovenska arbitražna praksa* (Ljubljana) 2:1:28-34, 2013.
- Ferrari, F. Tendence insulariste et lex forisme malgré un droit uniforme de la vente. *Revue critique de droit international privé* (Paris) 102:2:323-358, 2013.
- \_\_\_\_\_. The CISG's interpretative goals, its interpretative method and its general principles in case law (parts I and II). *Internationales Handelsrecht* (München) 13:4:137-155, 2013; 13:5:181-197, 2013.
- Flanagan, A. E-Commerce: the regulation of insurance in the age of the internet. In *Research handbook on international insurance law and regulation*. Cheltenham, U.K., Edward Elgar, 2012. p. 569-602.
- Fogt, M. M. Private international law issues in opt-out and opt-in instruments of harmonization: the CISG and the proposal for a Common European Sales Law. *Columbia journal of European law* (New York) 19:83-141, 2013.
- Fokus: [journal section on the Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law]. *GPR-Zeitschrift für Gemeinschaftsprivatrecht* (München) 10:1:10-32, 2013. Selected contents: Zum

Verordnungsvorschlag für ein Gemeinsames Europäisches Kaufrecht (translation of title: On the proposed regulation on a Common European Sales Law) / I. M. de Figueiredo, p. 10-11 -- Point de vue français sur: La proposition de règlement relatif à un droit européen de la vente / A. Cotiga, A. Raccah, p. 11-12 -- Estland: ein Versuchsfeld für das Europäische Privatrecht? Estnische Erfahrungen mit der Anwendung der Prinzipien des vereinheitlichten Europäischen Privatrechts (translation of title: Estonia: a testing ground for the European Private Law? Estonia's experience in applying principles of unified European private law) / K. Sein, p. 13-24.

Fontaine, M. Law harmonization and local specificities: a case study: OHADA and the law of contracts. *Uniform law review = Revue de droit uniforme* (Roma) 18:1:50-64, 2013.

Graves, J. Law of contracts or laws of contracts?: penalty clauses as remedies: exploring comparative approaches to enforceability. *Touro law review* (Central Islip, N.Y.) 29:681-693, 2013.

Grbic, K. Putting the CISG where it belongs: in the Uniform Commercial Code. *Touro law review* (Central Islip, N.Y.) 29:173, 2013.

Gruenbaum, D. Resolução do contrato: avoidance na CISG. *Revista de arbitragem e mediação* (Brasília) 10:37:83-105, 2013. Translation of title: Avoidance of contract under the CISG (1980).

Hrnčičíříková, M. and others. A few thoughts on the New Common European Sales Law. *Czech yearbook of international law* (Huntington, N.Y.) 4:123-142, 2013.

Hu, X. CISG 在中国适用的方法论思辨. *Commercial research* (China) 7:21-25, 2011. Translation of title: On a methodology for CISG (1980) application in China.

Illescas Ortiz, R. and M. del P. Perales Viscasillas. The scope of the Common European Sales Law: B2B, goods, digital content and services. *Journal of international trade law and policy* (Bingley, U.K.) 11:3:241-258, 2012.

International Institute for the Unification of Private Law. Model clauses for the use of the Unidroit Principles of International Commercial Contracts. Rome, Unidroit, 2013. 22 p.

Janyst, T. The influence of the United Nations Convention on Contracts for the International Sale of Goods on Chinese contract law: damages for breach of contract. Warsaw, s.n., 2011. 89 p. Thesis (magister) - University of Warsaw, 2011.

Jenkins, S. H. Construing laws governing international and U.S. domestic contracts for the sale of goods: a comparative evaluation of the CISG and UCC rules of interpretation. *Temple international and comparative law journal* (Philadelphia, Pa.) 26:181-211, 2012.

\_\_\_\_\_. Rejection, revocation of acceptance, and avoidance: a comparative assessment of UCC and CISG goods oriented remedies. *Minnesota journal of international law* (Minneapolis, Minn.) 22:152-213, 2013.

Johnson, V. R. Book review: Regional sales law in a world of global transactions. *Chinese journal of comparative law* (Oxford) 1-8, 2013.

Johnson, W. P. Turkey's accession to the CISG: the significance for Turkey and for sales transactions with U.S. contracting parties. *Ankara law review* (Ankara) 8:1:1-52, 2011.

Kadner Graziano, T. Solving the riddle of conflicting choice of law clauses in battle of forms situations: the Hague solution. *Yearbook of private international law* (The Hague) 14:71-101, 2013.

Kayibanda, R. Passing of property in goods in contracts of international sale of goods. *Estey Centre journal of international law and trade policy* (Saskatoon, Sask.) 14:2:68-86, 2012.

- Kelong, R.W.N. Problems relating to the place of performance for payment of damages and the admissibility of set-off claims under Article 74 CISG. *Surrey law working papers* (Surrey, U.K.) short notes, issue 3, 2013.
- Kim, J. 국제물품매매에서의 소멸시효에 관한 연구. *Hankuk University of Foreign Studies, collection of dissertations* (Seoul) 6:12:256-317, 1977. Translation of title: Study on the limitation period in international sale of goods.
- Klepper, C. D. The Convention for the International Sale of Goods: a practical guide for the State of Maryland and its trade community. *Maryland journal of international law* (Baltimore, Md.) 15:2:235-261, 1991.
- Klimas, T. The questionable reception of the CISG in the Baltic States, Belarus, Bulgaria & the Ukraine. *Social science research network* October 2, 2013. Available online at <http://ssrn.com/abstract=2334777>
- Knieper, J. Der Rechtsweg Albaniens nach Europa: ein Schritt dahin: die Konvention über das internationale Kaufrecht. *Wirtschaft und Recht in Osteuropa* (München) 19:6:175-177, 2010. Translation of title: Albania's legal path to Europe: the CISG (1980) as another step forward.
- Kohen, M. G. and D. Bentolila. Mélanges en l'honneur du Professeur Jean-Michel Jacquet: le droit des rapports internationaux économiques et privés. Paris, Lexis Nexis, 2013. 564 p. Selected contents: The transnationalization of national contract law by the international arbitrator / G. Kaufmann-Kohler, p. 107-120 -- Retour sur les sources premières de la lex mercatoria: les usages du commerce international / E. Loquin, p. 215-234 -- Entre autonomie conflictuelle et autonomie substantielle: le choix du future droit commun européen de la vente - à propos de la proposition de règlement de la Commission Européenne du 11 octobre 2011 / S. Corneloup, p. 367-386 -- L'applicabilité spatiale du nouveau droit OHADA de la vente commerciale et le droit international privé: une réforme inachevée / P.-G. Pougoué et G. Ngoumtsa Anou, p. 541-560.
- Kornet, N. The interpretation and fairness of standardized terms: certainty and predictability under the CESL and the CISG compared. *Maastricht European Private Law Institute working paper* (Maastricht, The Netherlands) 2013:8.
- Kossak, M. von. The remedial system under the proposed Common European Sales Law (CESL). *European journal of commercial contract law* (Zutphen, The Netherlands) 5:1:7-18, 2013.
- Landolt, P. Summary of Swiss case law on the CISG from 2008 until March 2013. *Jusletter* (Bern) 26 August 2013.
- Lee, B.-M. The buyer's duty to examine the goods and to notify the seller of lack of conformity under Korean law in comparison with PELS and the CISG. *Journal of Korea trade* (Seoul) 12:3:175-199, 2008.
- Lee, H. 국제물품매매에서의 소멸시효에 관한 협약. *Kyonggi University law journal* (Seoul) 1:167-197, 2000. Translation of title: Limitation Convention (1974/1980).
- \_\_\_\_\_. 국제물품매매에서의 소멸시효에 관한 협약. *Yonsei legal studies* (Seoul) 4:415-438, 1997. Translation of title: Limitation Convention (1974/1980). In Korean with abstract in English.
- Leible, S. and M. Müller. Die Reichweite von Artikel 80 CISG. *Internationales Handelsrecht* (München) 13:2:45-50, 2013. Translation of title: The scope of Article 80 CISG (1980).
- Li, W. 论中国对于《联合国国际贸易销售合同》第 1 条 b 项的保留. *The jurist* (China) 5:93-103, 2012. Translation of title: On the positive meaning of China's withdrawing its reservation to article 1(b) CISG (1980).
- Li, X. Y. On translation approaches of international treaties from English to Chinese: a case study of CISG. *Oversees English* (China) 4:285-286, 2012.

- Lichtenstein, F. Neue Auslegungsbestimmungen zum chinesisches Kaufrecht. *Internationales Handelsrecht* (München) 13:3:98-107, 2013. Translation of title: New rules of interpretation in Chinese sales law.
- Liu, K. and Y. D. Wei. 关于 CISG‘补缺’规则的探讨. *Chinese and foreign entrepreneurs* (China) 7:163-168, 2011. Translation of title: Study on gap-filling in CISG (1980).
- Liu, Y. CISG 损害赔偿制度之因果关系案例分析. *Modern finance and economics: Journal of Tianjin University of Finance* (China) 12:108-116, 2011. Translation of title: Analysis on the causal relationship in the damage compensation system of the CISG (1980).
- \_\_\_\_\_. CISG 项下违约商誉损失赔偿实证研究. *Theory and modernization* (China) 6:79-85, 2011. Translation of title: Legal practice of compensation of commercial reputation incurred as a result of the breach under CISG (1980).
- \_\_\_\_\_. 论 CISG 损害赔偿制度中的可预见要求. *Journal of Guangdong Institute of Public Administration* (China) 2:59-65, 2012. Translation of title: Study on the foreseeability requirements in the damage compensation system of the CISG (1980).
- Lopez, M. B. Resurrecting the public good: amending the validity exception in the United Nations Convention on Contracts for the International Sale of Goods for the 21st century. *Journal of business & securities law* (East Lansing, Mich.) 10:133-171, 2010.
- Low, G. A psychology of choice of laws. *European business law review* (London) 24:3:365-387, 2013.
- Majumdar, A. B. Uniform Commercial Code v. the Vienna Convention on the International Sale of Goods: a comparative analysis. *Social science research network* May 18, 2013. Available online at <http://ssrn.com/abstract=2266754>.
- Malkhasyan, A. Transfer of risk in international sales law. *Armenian yearbook of international and comparative law* (Yerevan) 1:9-32, 2013.
- Masoud, B. S. The Kenyan Insolvency Bill 2010: a cross-border insolvency analysis. *Open University law journal* (Dar Es Salaam) 4:1:195-207, 2013.
- Mazzacano, P. Damages under the UN Sale of Goods Convention. *Canadian international lawyer = Revue canadienne de droit international* (Ottawa) 9:2:82-85, 2013.
- Nagy, B. Unreliable excuses: how do differing persuasive interpretations of CISG Article 79 affect its goal of harmony? *New York international law review* (New York) 26:2:61-92, 2013.
- Neumann, T. The continued saga of the CISG in the Nordic countries: reservations and transformation reconsidered. *Nordic journal of commercial law* (Turku, Finland) 1:2013.
- \_\_\_\_\_. The duty to cooperate in international sales: the scope and role of Article 80 CISG. Munich, Sellier European Law Publishers, 2012. 273 p.
- Norman J. Shachoy symposium: assessing the CISG and other international endeavors to unify international contract law: has the time come for a new global initiative to harmonize and unify international trade? *Villanova law review* (Villanova, Pa.) 58:4:487-771, 2013. Special journal issue. Selected contents: An overview of the CISG and an introduction to the debate about the future convention / M. Bridge, p. 487-491 --- Possible future work by UNCITRAL in the field of contract law: preliminary thoughts from the secretariat / R. Sorieul, E. Hatcher, C. Emery, p. 491-508 -- A new global initiative on contract law in UNCITRAL: right project, right forum? / K. Loken, p. 509-520 -- The soft law approach to unification of international commercial contract law: future perspectives in light of Unidroit's experience / A. Veneziano, p. 521-528 -- Article 35 of the CISG: reflecting on the present and thinking about the future / D. Saidov, p. 529-552 -



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- Nwafor, N. A. Comparative evaluation of the doctrine of fundamental breach under the CISG, UNIDROIT Principles and the English law. *Social science research network* October 15, 2013. Available online at <http://ssrn.com/abstract=2340440>.
- Oh, S.-C. 국제물품매매에서의 소멸시효에 관한 UN 협약. *Arbitration journal* (Seoul) 192:1:26-31; 193:2:10-21, 1988. Translation of title: Limitation Convention (1974/1980).
- Omlor, S. and G. Beckhaus. Vermeintliche und tatsächliche Lücken im UN-Kaufrecht. *Internationales Handelsrecht* (München) 13:6:237-245, 2013. Translation of title: Perceived and actual gaps in the CISG (1980).
- Ostendorf, P. International sales terms. 2nd ed. München, Verlag C.H. Beck, 2014. 183 p.
- Osuna González, A. La CISG y la carta de crédito como medio de pago: un recuento jurisprudencial. *abogadostijuana.net* (Tijuana, Mexico) [2007].
- Oviedo Albán, J. Costumbre y prácticas contractuales en la Convención de Naciones Unidas sobre Contratos de Compraventa Internacional de Mercaderías. *Cadernos da Escola de Direito e Relações Internacionais* (Curitiba, Brazil) 12:1:32-43, 2010.
- \_\_\_\_\_. The general principles of the United Nations Convention for the International Sale of Goods. *Cuadernos de derecho transnacional* (Madrid) 4:1:165-179, 2012.
- Park, H.-H. 국제사법규정을 통한 국제물품매매협약의 적용상의 문제점. *HUFS law review* (Seoul) 36:4:81-96, 2012. Translation of title: Conflict of laws problems in application of the CISG (1980).
- Pavić, V. and M. Đjordjević. The scope and sphere of application of the CISG in the Balkans. In *Festschrift für Helmut Rüssmann*. J. Stamm, ed. Saarbrücken, Germany, Juris, 2013. p. 887-916.
- Pérez Vargas, V. La Convención de Naciones Unidas para la Compraventa Internacional de Mercaderías: necesidad de su ratificación en Costa Rica. Congreso Convención de Naciones Unidas para la Compraventa Internacional de Mercaderías, Colegio de Abogados de Costa Rica, 19 noviembre 2013.
- Piltz, B. Recent developments in UN law on international sales (CISG). *European journal of commercial contract law* (Zutphen, The Netherlands) 5:3:73-80, 2013.
- Pirozzi, R. The effect of changing circumstances in international commercial contracts: the Scaform case. *Vindobona journal of international commercial law and arbitration* (Vienna) 16:2:207-222, 2012.

- Rahbari, E. and A. Rezaee. The role of electronic agents in concluding the contract. *Law quarterly* (Tehran) 41:4:159-178, 2013. In Persian (Farsi), title translated from the original.
- Rahman, M. F. Crisis time drafting of commercial contracts. *The daily star* (Dhaka) 18 February 2014.
- Rogowska, A. Some considerations on the desirability of accession to the CISG by the UK. *European journal of commercial contract law* (Zutphen, The Netherlands) 5:2:31-43, 2013.
- Sánchez-Lorenzo, S. A. Common European Sales Law and private international law: some critical remarks. *Journal of private international law* (Oxford, U.K.) 9:2:191-217, 2013.
- Sandvik, B. and L. Sisula-Tulokas. HD 2012:101: ett nytt köplagsfall. *Tidskrift utgiven av juridiska föreningen i Finland* (Helsinki) 2:143-150, 2013. Translation of title: Supreme Court Decision 2012:101 - a new case on the Finnish Sale of Goods Act.
- Schwenzer, I. H. and others. Kommentar zum Einheitlichen UN-Kaufrecht: das Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf CISG. 6. völlig neu bearbeitete Auflage. München, C. H. Beck, 2013. 1444 p.
- Schwenzer, I. H. and L. Spagnolo, eds. Globalization versus regionalization: 4th Annual MAA Schlechtriem CISG Conference, 18 March 2012, Hong Kong. Conference in honour of Peter Schlechtriem 1933-2007. The Hague, Eleven International Publishing, 2013. 115 p. Selected contents: Ch. 1. Reservations of the CISG: regional trends and developments / C. Baasch Andersen -- Ch. 2. The perversity of contract law regionalization in a globalizing world / P. Butler -- Ch. 3. CISG in time of crisis: an opportunity for increased efficiency / L. G. Castellani -- Ch. 4. The avoidance of contract under the CISG: some comparative remarks from a Chinese perspective / Shiyuan Han -- Ch. 5. Globalizing international trade, investment and commercial laws through regionalism: the prospects / E. T. Laryea -- Ch. 6. Brazil's adherence to the CISG - consequences for trade in China and Latin America / E. Muñoz and L. G. Meira Moser -- Ch. 7. CESL and CISG / I. Schwenzer.
- Schwenzer, I. H. and D. Tebel. The word is not enough: arbitration, choice of forum and choice of law clauses under the CISG. *ASA bulletin* (Alphen aan den Rijn, The Netherlands) 31:4:740-755, 2013.
- Seong, S. H. 联合国国际货物销售合同公约解除制度模式的比较法史研究. *Tsinghua law journal* (China) 5:115-135, 2011. Translation of title: Comparative study on the termination of contracts under CISG (1980).
- Sese, Atsuko. CIETAC による中国企業を当事者とする仲裁判断におけるウィーン動産売買条約の解釈に関する研究. *Kokusai shōji hōmu* (Tokyo) 41:12:1829-1840, 2013. Translation of title: Arbitration cases in which CIETAC interpreted the CISG (1980). In Japanese.
- Shen, Z. T. 联合国国际货物销售合同公约中习惯做法的认定. *People's judicature* (China) 24:32-35, 2012. Translation of title: Recognition of 'international practices' under the CISG (1980).
- Shi, H. 论《联合国国际货物销售合同公约》第九十六条保留的法律效果. *Science economy society* (China) 1:127-132, 2012. Translation of title: On the legal effect of reservation of CISG (1980) article 96.
- Sill, K. B. and R. S. Jeffrey. Up, around, over, and under: a textual case for busting through the supposed privity barrier of CISG Article 4. *North Carolina journal of international law and commercial regulation* (Chapel Hill, N.C.) 38:697-728, 2013.

- Simos, E. The CISG: a lost cause in the UK? *Vindobona journal of international commercial law and arbitration* (Vienna) 16:2:251-282, 2012.
- Sobion, J. The Caribbean Community, the Caribbean Single Market and Economy, and the CISG: three ways of promoting international trade in the Caribbean region. Cape Town, s.n., 2012. 105 p. Thesis (LL.M.) - University of Cape Town, [2012].
- Sono, H. 私法統一の現状と課題(1) 売買・一般契約法. *New business law* (Tokyo) 998:12-19, 2013. Translation of title: Current state of the unification of private law: vol.1 sales of goods and general contract law.
- South East European Law School, ed. New perspectives of South East European private law: South East European post-doctoral colloquium in private law - proceedings. Skopje, SEELS, 2012. 257 p. Selected contents: Case law as a trigger of CISG Uniform Global Era (CUGE) / A. Spaić, p. 210-219.
- Spagnolo, L. KLRI-UNCITRAL joint research: perspectives and trends [VI], CISG implementation in Asia and the Pacific. Seoul, Korea Legislation Research Institute, 2013. 150 p.
- Srinivasan, B. UNCITRAL Arbitration Rules, 2010: comment on certain revisions. *Indian journal of arbitration law* (Jodhpur, India) 2:2, 2013.
- Stemler, A. and A. H. Raymond. Promoting investment in agricultural production: increasing legal tools for small to medium farmers. *Ohio State entrepreneurial business law journal* (Columbus, Ohio) 8:2:281-325, 2013.
- Sugiura, Y. 「国連国際物品売買に関する時効条約」に加入すべきか = ‘국제연합 국제물품매매에 관한 시효조약’에 가입하여야 할 것인가. *Pusan National University law review* (Pusan, Republic of Korea) 51:1:311-356, 2010. Translation of title: Should we accede to the Limitation Convention (1974/1980)? In Japanese and Korean.
- Sun, H. 《联合国国际贸易 销售合同公约》第 78 条利率问题的探究. *Journal of Jiangxi University of Finance and Economics* (China) 2:122-128, 2012. Translation of title: Study of the calculation of the interest rate under article 78 of the CISG (1980).
- Taniguchi, Y. Deepening confidence in the application of CISG to the sales agreements between the United States and Japanese companies. *Richmond journal of global law & business* (Richmond, Va.) 12:2:277-298, 2013.
- Taufiqurrahman, S.M.H. The significance of accession to the United Nations Convention on Contracts for the International Sale of Goods 1980 for Indonesia. *Juridical tribune* (Bucharest) 2:2:54-71, 2012.
- UN. Brasil adere à Convenção da ONU sobre contratos internacionais de compra e venda de mercadorias. *ONUBR: Nações Unidas no Brasil* 5 March 2013. Translation of title: Brazil accedes to CISG (1980).
- Varga, D. A few comments on Brazil's accession to the United Nations Convention on Contracts for the International Sale of Goods. *Brazil business brief* (United Kingdom) 15:46:12-13, 2013.
- Vasiljević, M. Private law reform in South East Europe: liber amicorum Christa Jessel-Holst. Belgrade, Faculty of Law, University of Belgrade, 2010. 526 p. Selected contents: ‘Mexican revolution’ in CISG jurisprudence and case-law: attorneys’ fees as (non)recoverable loss for breach of contract / M. Đorđević, p. 199-220.
- Vechosotsakda, P. การตั้งข้อสงวนของอนุสัญญาสหประชาชาติว่าด้วยสัญญาซื้อขายสินค้าระหว่างประเทศสำหรับประเทศไทย. Bangkok, Thammasat University, 2011. 293 p. Thesis (Master of Laws) - Thammasat University, 2011. Translation of title: Reservations under the CISG (1980) for Thailand. In Thai.

- Vieira, I. de A. La Convention de Vienne et l'arbitrage: perspectives en droit brésilien. *Uniform law review = Revue de droit uniforme* (Roma) 18:3-4:606-629, 2013.
- \_\_\_\_\_. The CISG and party autonomy in Brazilian international contract law. *Panorama of Brazilian law* (Rio de Janeiro, Brazil) 1:1:173-186, 2013.
- Vitkus, S. Penalty clauses within different legal systems. *Social transformation in contemporary society* (Vilnius) 1:153-162, 2013.
- Vorobey, D. V. CISG and arbitration clauses: issues of intent and validity. *Journal of law and commerce* (Pittsburgh, Pa.) 31:1:135-161, 2013.
- Wang, J. China's reservation under the CISG (1980). *Journal of Jiangxi University of Finance and Economics* (China) 32:2:79-82, 2004. In Chinese.
- Wang, L. 《联合国国际货物销售合同公约》与我国合同法的制定和完善. *环球法律评论 = Global law review* (Beijing) 5, 2013. Translation of title: Developing and improving the CISG (1980) and contract law of China.
- \_\_\_\_\_. CISG 公约的修改与中国合同法. *环球法律评论 = Global law review* (Beijing) 35:5:119-131, 2013. Translation of title: Drafting and improvement of the CISG (1980) and contract law of China.
- Wester-Ouisse, V. Le transfert de propriété solo consensu: principe ou exception? *Revue trimestrielle de droit civil* (Paris) 2:299-313, 2013.
- Williams, J. Increasing private sector participation in Ghana through the adoption and implementation of the CISG. *Africa law today* (Chicago, Ill.) 4:4:1-3, 2012.
- Witz, C. Droit uniforme de la vente internationale de marchandises: janvier 2012 - juillet 2013. *Recueil Dalloz* (Paris) 189:43:2874-2886, 2013.
- Wu, C. 论合同解除与风险转移的关系 - 以《联合国国际货物销售合同公约》为中心. *Journal of Nanchang University* (China) 4:70-74, 2011. Translation of title: On the relationship between termination of contract and transfer of risk.
- Xuan, Z. and Y. Wang. 我国法院对《联合国国际货物销售合同公约》的适用. *Law science magazine* (China) 5:125-131, 2012. Translation of title: Application of CISG (1980) in China courts.
- Yong, F. L. 傅林涌: 适用 UNCITRAL 规则在中国仲裁的困局. *China arbitration online* (China) 30 November 2012. Translation of title: Applicability of the UNCITRAL Arbitration Rules to disputes in China.
- Yoon, N. S. 국제물품매매계약에 관한 국제연합협약의 적용대상. *Korean Academic Society of Business Administration and Law journal* (Seoul) 21:2:687-717, 2011. Translation of title: Subject-matter application of the CISG (1980).
- Yuksel, B. Remedies of the buyer in CISG and Turkish Code of Obligations and an economic analysis. *Social science research network* January 28, 2014. Available online at <http://ssrn.com/abstract=2386649>
- Zeller, B. Interpretation of Article 8: is it consistent with the function of the global jurisconsultorium? *Internationales Handelsrecht* (München) 13:3:89-97, 2013.
- Zengye, Y. F. 国际货物销售合同公约与 PACL 的相互作用. *Tsinghua law journal* (China) 7:35-45, 2013. Translation of title: Interaction between CISG (1980) and PACL.
- Zhu, G. 要约不得撤销的法定事由与效果. *环球法律评论 = Global law review* (Beijing) 5:93-106, 2012. Translation of title: Irrevocable offers: legal reasons and effects.
- Zou, G. Y. and M. L. Chen. 论 CISG 的根本违约制度. *Theory monthly* (China) 7:174-178, 2012. Translation of title: Mechanism of the fundamental breach of contract under CISG (1980).

Zuhir, M. A. *Standarisasi Perdagangan Internasional Dalam Viena Convention on the International Sale of Goods [CISG] 1980*. Palembang, Indonesia, Universitas Sriwijaya, 2012. 40 p. Working Paper, Universitas Sriwijaya, 2012. Translation of title: Standardization of international trade under the CISG (1980). In Indonesian.

全球化背景下的国际贸易规则一体化：中国与世界 = Unification of international trade rules in the age of globalization: China and the world [conference papers], October 19-20, 2013, [Beijing, China]. Beijing, Tsinghua University, 2013. 178 p. Contents: 《联合国国际货物销售合同公约》与中国合同法的制定与完善 = Developing and perfecting the CISG and Chinese contract law / Liming Wang -- CISG and national sales law / J. Ramberg -- 实际履行救济方式的法律实务思考 = Considerations in the implementations of remedies for performance breach: from the legal practice perspective / Zhidong Chen, Haizhou Chen -- Dodging windfalls: damages based on market price, actual loss and appropriate awards / J.Y. Gotanda -- Interest claim under the CISG: uniform or domestic law approach? / Y.M. Atamer -- Why China should withdraw its reservation to the United Nations Convention on Contract for the International Sale of Goods (CISG) under Article 95 / Jingzhou Tao -- 论我国撤销 CISG 第 95 条保留之必要性 = On China's necessity to withdraw its reservation to CISG under Article 95 / Tao Du -- Reviewing CISG declarations: some lessons learned / L.G. Castellani -- The withdrawal of state declarations under uniform private law convention / U.G. Schroeter -- Full and partial exclusion from the CISG / L. Spagnolo -- 中国法院适用《联合国国际货物销售合同公约》初评 / CISG in Chinese courts: a preliminary survey / Qiao Liu, Xiang Ren -- The Need for CISG countries to adopt the Electronic Communications Convention / S. Eiselen -- The CISG: a tool for the internationalisation of the curriculum / M. Hiscock - 再论合同法第 121 条的存废——以履行辅助人责任论为视角 = Revisiting the Argument on abolition of Article 121 of the PRC contract law: the assistant performers' perspective and considerations of their obligations / Gen Xie -- CISG 减损规则及其在中国的适用 / CISG's 'mitigation principle' and its application in China / Ying Liu -- Judicial and arbitral application of international business law in China / Haicong Zuo -- 情事变更的几个问题 = On the issues of circumstance alternation / Shiyuan Han -- 论中国大陆《合同法》中出卖人物之瑕疵责任的构成 / Constitutive elements of seller's liability of defect warranty in contract law of the People's Republic of China / Hongli Ning -- 瑕疵担保责任定位的重思 = Reconsidering the orientation of seller's liability of defect warranty / Teng Wu -- 合同订立过程中的格式之战问题 = 'Battle of the forms' in formation of contract / Guangxin Zhu -- 论 CISG 损害赔偿制度的完善——以 PICC 对 CISG 解释补充作用为视角 = The perfection of CISG damage compensation system: in perspective of the interpretation or supplementary function of PICC to CISG / Haicong Zuo, Mengsha Yang.

### III. International commercial arbitration and conciliation

A sonnet most favored. New York, s.n., 2014. 1 p. 'By the delegations of the United States, Australia, Singapore, Canada, Israel, and (to the extent it relates to portfolio investment rather than foreign direct investment) the United Kingdom and the Czech Republic.' Submitted during the 60th session of Working Group II (Arbitration and Conciliation), 3-7 February 2014, New York.

Accession of the Democratic Republic of Congo to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *Jones Day commentary* (Washington, D.C.) August 2013.

Allen, V. L. and S. Martins. Application of the New York Convention in Spain and Portugal: are the courts getting it right? = La Convention de New York en Espagne et au Portugal. *Revue de droit des affaires internationales = International business law journal* (Paris) 4:267-286, 2013.

- Al-Nasair, M. and I. Bantekas. Nullity and jurisdictional excess as grounds for non-enforcement of foreign awards in Bahrain and the UAE. *Journal of international arbitration* (Alphen aan den Rijn, The Netherlands) 30:3:283-301, 2013.
- \_\_\_\_\_. The effect of public policy on the enforcement of foreign arbitral awards in Bahrain and UAE. *International arbitration law review* (London) 16:3:88-96, 2013.
- Alshubaiki, T. A. Developing the legal environment for business in the Kingdom of Saudi Arabia: comments and suggestions. *Arab law quarterly* (Leiden, The Netherlands) 27:4:371-391, 2013.
- Application of the doctrine of forum non conveniens in summary proceedings for the recognition and enforcement of awards governed by the New York and Panama Conventions: report of the International Arbitration Club of New York. *American review of international arbitration* (New York) 24:1-27, 2013.
- Babić, D. Mediation law in Croatia: when EU Mediation Directive met the UNCITRAL Model Law on Conciliation. *SchiedsVZ* (München) 11:4:214-223, 2013.
- Bachand, F. and F. Gélinas, eds. D'une réforme à une autre: regards croisés sur l'arbitrage au Québec. Québec, Editions Yvon Blais, 2013. 648 p. Selected contents: Regard intimiste sur l'état de l'arbitrage au Québec il y a 25 ans / N. Antaki -- Favor arbitrandum et favor validitatis / F. Gélinas -- La confidentialité de l'arbitrage, un laboratoire de l'obligation implicite / S. Grammond -- Usages et règles non étatiques: une harmonisation difficile? / E. S. Darankoum -- Les 25 ans de la réforme de l'arbitrage au Québec - Regard d'outre-Atlantique / C. Seraglini -- Quelques zones grises autour de l'arbitrage de consommation / G. Saumier -- L'annulation des sentences arbitrales 'investisseur État' en vertu de la Loi type au Canada et du régime du CIRDI / A. de Mestral -- En quête d'un droit de l'arbitrage concurrentiel: ce que le Québec pourrait apprendre de Singapour et de Hong Kong / G. F. Bell -- Éléments d'une Loi type réformée / A. Prujiner -- Vers une nouvelle réforme du droit québécois de l'arbitrage conventionnel / F. Bachand.
- \_\_\_\_\_. The UNCITRAL Model Law after twenty-five years: global perspectives on international commercial arbitration. Huntington, N.Y., Juris, 2013. 362 p. Selected contents: Ch. 1 Review of the Model Law's implementation after twenty-five years / T. Lemay and C. Montineri, p. 3-12 -- Ch. 2 The impact of the UNCITRAL Model Law on the evolving interpretation and application of the 1958 New York Convention / J. Freedberg, p. 13-25 -- Ch. 3 The enforcement of arbitration agreements under Art. 8 of the Model Law / L. Boo, p. 29-48 -- Ch. 4 Direct review of arbitral jurisdiction under the UNCITRAL Model Law on International Commercial Arbitration: an assessment of Art. 16(3) / S. Greenberg, p. 49-93 -- Ch. 5 Comments on some aspects of Ch. V: the production of documentary evidence and privilege / J-G. Castel, p. 95-105 -- Ch. 6 Exercising discretion under Arts. 34 and 36 of the Model Law: a review of practice / A. Kawharu, p. 109-137 -- Ch. 7 The public policy defence in the Model Law jurisprudence: the ILA report revisited / S. Kröll, p. 139-165 -- Ch. 8 Delocalization and its relevance in post-award review / L. Mistelis, p. 167-181 -- Ch. 9 The UNCITRAL Model Law and the pro-arbitration approach: judicial internationalism and international interpretation - the Singapore experience / Q. Loh, p. 185-215 -- Ch. 10 The Model Law after twenty-five years: a German judicial perspective on international interpretation / M. Lorbacher, p. 217-227 -- Ch. 11 Judicial internationalism and the interpretation of the Model Law: reflections on some aspects of Art. 2A / F. Bachand, p. 231-251 -- Ch. 12 The CLOUT system (Case Law on UNCITRAL Texts): an UNCITRAL experience / M. Canafoglia, p. 253-259 -- Ch. 13 From harmonized legislation to harmonized law: hurdles and tools, judicial and arbitral perspectives / F. Gélinas, p. 261-275 -- Ch. 14 An

- international arbitrator's perspective on future reform / L. Y. Fortier and S. Bachand, p. 279-323.
- Baetens, F. Procedural issues relating to shared responsibility in arbitral proceedings. *Journal of international dispute settlement* (Oxford) 4:2:319-341, 2013.
- Bardina, M. P. Determination of substantive law by international commercial arbitration in Russian law, ICAC Rules and arbitration practice. *Czech (& Central European) yearbook of arbitration* (Huntington, N.Y.) 3:123-143, 2013.
- Beffa, L. Enforcement of 'default awards'. *ASA bulletin* (Alphen aan den Rijn, The Netherlands) 31:4:756-773, 2013.
- Bělohávek, A. J. Concept of foreign arbitral award in connection with recognition and enforcement and conflicts of sources. *Revista română de arbitraj* (București) 26:2:32-52, 2013.
- \_\_\_\_\_. Importance of the seat of arbitration in international arbitration: delocalization and denationalization of arbitration as an outdated myth. *ASA bulletin* (Alphen aan den Rijn, The Netherlands) 31:2:262-292, 2013.
- Belton, K. Game, set, and match: enforcement of arbitral awards against non-signatory parties. *American review of international arbitration* (New York) 24:161-196, 2013.
- Berger, B. Rights and obligations of arbitrators in the deliberations. *ASA bulletin* (Alphen aan den Rijn, The Netherlands) 31:2:244-261, 2013.
- Binder, P. Analytical commentary to the UNCITRAL Arbitration Rules. London, Sweet & Maxwell, 2013. 1253 p.
- Bobei, R. B. Commercial arbitration: elementary handbook on scholarly pragmatism. Bucharest, C.H. Beck, 2014. 280 p.
- Bollée, S. L'arbitrage et le nouveau Règlement Bruxelles I. *Revue de l'arbitrage* (Paris) 4:979-987, 2013.
- Bonnin Reynes, V. Forum non conveniens: a hidden ground to refuse enforcement of arbitral awards in the United States. *Journal of international arbitration* (Alphen aan den Rijn, The Netherlands) 30:2:165-175, 2013.
- Born, G. B. International arbitration and forum selection agreements: drafting and enforcing. 4th ed. Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2013. 450 p.
- Brand, R. A. Transaction planning using rules on jurisdiction and the recognition and enforcement of judgments. *Recueil des cours: Académie de Droit International = Collected courses of the Hague Academy of International Law* (Leiden, The Netherlands) 358:9-262, 2011.
- Brewer, T. J. and others. International commercial arbitration in Washington: the need for the Model Law. *Washington State Bar news* (Seattle, Wash.) 30-35, April 2012.
- Briggs, E. A. The applicability of arbitration in the Americas: an avant-garde approach to the Panama Convention. *University of Miami inter-american law review* (Coral Gables, Fla.) 43:3:563-591, 2012.
- Brödermann, E. The Chinese European Arbitration Centre: an introduction to the CEAC Hamburg Arbitration Rules. *Journal of international arbitration* (Alphen aan den Rijn, The Netherlands) 30:3:303-327, 2013.
- Bukola, F. Complementarity or disparity?: the UNCITRAL Model Law on International Commercial Arbitration 1985 and English Arbitration Act 1996 revisited. *University of Ibadan law journal* (Ibadan, Nigeria) 2:1:97-118, 2012.
- Burda, J. Le nouveau règlement suisse d'arbitrage international. *Journal du droit international* (Paris) 140:3:821-856, 2013.

- De Campos Melo, L. Recognition of foreign arbitral awards in Brazil. *American review of international arbitration* (New York) 24:113-161, 2013.
- Caron, D. D. and L. Caplan. The UNCITRAL arbitration rules: a commentary (with an integrated and comparative discussion of the 2010 and 1976 UNCITRAL Arbitration Rules). 2nd ed. Oxford, Oxford University Press, 2013. 1048 p.
- Castellani, L. The importance of UNCITRAL texts on arbitration for Japan: current status and future perspectives. *JCAA newsletter* (Tokyo) No. 30, September 2013.
- Ceccon, R. International commercial arbitration in Italy. *Comparative law yearbook of international business* (Alphen aan den Rijn, The Netherlands) 34:3-36, 2012.
- Cheng, S. and E. Yang. Setting aside an arbitral award in Hong Kong pursuant to Article 34 of the UNCITRAL Model Law: a practical guide. *Asian dispute review* (Hong Kong) 55-58, April 2013.
- Chlup, R., ed. Комментарий к арбитражным регламентам ведущих арбитражных институтов. St. Petersburg, Infotropic Media, 2012. 450 p. Translation of title: Commentary to the arbitration rules of the leading arbitral institutions.
- Corrie, C. A. International commercial arbitration in Brazil. *Comparative law yearbook of international business* (Alphen aan den Rijn, The Netherlands) 35:113-158, 2013.
- Court of Arbitration at the Polish Chamber of Commerce. Arbitration in Poland. Warsaw, Court of Arbitration at the Polish Chamber of Commerce, 2011. 231 p.
- Croft, C. and others. A guide to the UNCITRAL Arbitration Rules. New York, Cambridge University Press, 2013. 521 p.
- Diz, J.B.M. and C.C.N. Ribeiro. Impact of international treaties and conventions on the Brazilian arbitration law. *Panorama of Brazilian law* (Rio de Janeiro, Brazil) 1:1:153-171, 2013.
- Drličková, K. The law applicable to arbitration agreements: 'lex arbitri' or 'lex causae' of the principal contract? *Czech (& Central European) yearbook of arbitration* (Huntington, N.Y.) 3:71-87, 2013.
- ElGhatit, M. Enforcement of local arbitration awards in the Arab world and overseas. *International arbitration law review* (London) 16:4:105-109, 2013.
- Emanuele, F. and M. Molfa. Selected issues in international arbitration: the Italian perspective. London, Thomson Reuters, 2014. 329 p.
- Feldstein de Cárdenas, S. L. La reforma de la Ley Modelo sobre Arbitraje Comercial Internacional: una referencia para el derecho internacional privado Argentino. *Revista de derecho procesal civil y comercial* (Buenos Aires) No. 2, March 2013.
- Fietta, S. and J. Upcher. Public international law, investment treaties and commercial arbitration: an emerging system of complementarity? *Arbitration international* (London) 29:2:187-222, 2013.
- Filártiga Lacróix, C. A. Manual práctico sobre arbitraje. Asunción, La Ley, 2013. 314 p.
- Finizio, S. and C. Howitt. When international arbitration meets Sharia. *Commercial dispute resolution news* (London) 49-52, March-April 2013.
- Fortier, L.-Y. and S. Bachand. La nouvelle loi française sur l'arbitrage: vues d'Outre-Atlantique. *Cahiers de l'arbitrage = Paris journal of international arbitration* (Paris) 1:9-26, 2013.
- Fouchard, C. and F. Vaz Pinto. La nouvelle loi portugaise sur l'arbitrage. *Revue de l'arbitrage* (Paris) 2:367-391, 2013.
- Galič, A. Procesnopravni vidiki potrditve izvršljivosti domačih arbitražnih odločb v Sloveniji. *Slovenska arbitražna praksa* (Ljubljana) 2:3:4-10, 2013. Translation



- of title: Procedural aspects of enforcement of domestic arbitral awards in Slovenia.
- Gallagher, P. and F. Kieran. Unifying the legislative regime for domestic and international arbitration in Ireland. *European international arbitration review* (Huntington, N.Y.) 1:2:177-189, 2012.
- Garnett, R. Coexisting and conflicting jurisdiction and arbitration clauses. *Journal of private international law* (Oxford, U.K.) 9:3:361-386, 2013.
- Garnett, R. and L. Nottage. What law (if any) now applies to international commercial arbitration in Australia? *UNSW law journal* (Sydney) 35:3:953-978, 2012.
- Gaultier, T. Cross-border mediation: a new solution for international commercial dispute settlement? *International law practicum* (New York) 26:1:38-58, 2013.
- Georgiou, P. Myanmar's accession to the New York Convention. *Asian dispute review* (Hong Kong) 74-76, July 2013.
- Ghouri, A. A. Law and practice of foreign arbitration and enforcement of foreign arbitral awards in Pakistan. Heidelberg, Germany, Springer, 2013. 54 p.
- Giordano Ciancio, A. Mediation at the intersection with contract law: the settlement agreement. *Social science research network* June 1, 2013. Available online at <http://ssrn.com/abstract=2272989>
- Gonçalves, M. and others. Lei da arbitragem voluntária comentada: Angola. Coimbra, Almedina, 2013. 285 p.
- Gupta, S. Maladies of Indian arbitration: a case for a dualist regime. *International arbitration law review* (London) 16:2:69-80, 2013.
- Gurkov, A. The second-look doctrine in Russian Arbitrazh courts. *Review of Central and East European law* (Leiden, The Netherlands) 38:3-4:389-402, 2013.
- Haas, U. Schiedsgerichte in Erbsachen und das New Yorker Übereinkommen über die Anerkennung und Vollstreckung ausländischer Schiedssprüche. *SchiedsVZ* (München) 9:6:289-301, 2011. Translation of title: Arbitration in matters of succession and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("New York Convention (1958)").
- Harb, J.-P. and A. G. Leventhal. The new Saudi arbitration law: modernization to the tune of Shari'a. *Journal of international arbitration* (Alphen aan den Rijn, The Netherlands) 30:2:113-130, 2013.
- Harisankar, K. S. International commercial arbitration in Asia and the choice of law determination. *Journal of international arbitration* (Alphen aan den Rijn, The Netherlands) 30:6:621-636, 2013.
- Harris, T. L. Customary international arbitration law. *American review of international arbitration* (New York) 24:245-270, 2013.
- He, Q. Public policy in enforcement of foreign arbitral awards in the Supreme People's Court of China. *Hong Kong law journal* (Hong Kong) 43:1037-1060, 2013.
- Heeg, C. and F. Brauch. Where to turn for China-related arbitration?: CEAC arbitration as a neutral compromise tailored for Chinese-European disputes. *Vindobona journal of international commercial law and arbitration* (Vienna) 16:2:191-204, 2012.
- Hinchey, J. W. and T. L. Harris. International construction arbitration handbook. New York, Thomson Reuters Westlaw, 2013. 2 v.
- Holmes, M. B. Enforcement of annulled arbitral awards: logical fallacies and fictional systems. *Arbitration* (London) 79:3:244-255, 2013.

- Hopt, K. J. and F. Steffek, eds. *Mediation: principles and regulation in comparative perspective*. Oxford, Oxford University Press, 2013. 1347 p.
- Hunter, J. M. India's arbitration legislation: does the single act serve the purpose. *Indian journal of arbitration law* (Jodhpur, India) 2:2, 2013.
- Hunter, M. and A. Banerjee. National arbitration legislation: one act or two? *Arbitration* (London) 80:1:62-66, 2014.
- Hutchinson, G. B. The existence of the arbitration agreement and the Kompetenz-Kompetenz principle in Irish law. *Arbitration* (London) 80:1:73-81, 2014.
- International Chamber of Commerce. ICC Guide to national procedures for recognition and enforcement of awards under the New York Convention = Guide CCI des procédures nationales pour la reconnaissance et l'exécution des sentences relevant de la Convention de New York = Guía CCI de los procedimientos nacionales de reconocimiento y ejecución de los laudos bajo la Convención de Nueva York. Paris, ICC, 2013. 430 p. From title page: 'ICC International Court of Arbitration Bulletin, 2012 Special Supplement.'
- Jacobs, M. S. Commentary on *TCL Air Conditioner (Zhongshan) Co Ltd v the judges of the Federal Court of Australia* [2013] HCA 5 in which a constitutional challenge to the Australian International Arbitration Act 1974 and the UNCITRAL Model Law (which under Section 16 of the Act is part of the Law of Australia), was rejected. *Mealey's international arbitration report* (King of Prussia, Pa.) 28:3:19-24, 2013.
- \_\_\_\_\_. The approach of a court when it is sought to enforce an international arbitral award in Australia under the provisions of the International Arbitration Act 1974 (Cth) or the UNCITRAL Model Law, when that award has been set aside or stayed in a foreign court: a discussion of the legal and discretionary principles involved. *Mealey's international arbitration report* (King of Prussia, Pa.) 28:10:32-60, 2013.
- Junita, F. The concept of public policy exception to the enforcement of foreign arbitral awards: the Indonesian perspective. *International arbitration law review* (London) 16:5:148-161, 2013.
- Karton, J. Reform of investor-state dispute settlement: lessons from international uniform law. *Transnational dispute management* (Voorburg, The Netherlands) 11:1, January 2014.
- Kaufmann-Kohler, G. Commercial arbitration before international courts and tribunals: reviewing abusive conduct of domestic courts. *Arbitration international* (London) 29:2:153-173, 2013.
- Keane, P. A. The prospects for international arbitration in Australia: meeting the challenge of regional forum competition or our house, our rules. *Arbitration* (London) 79:2:195-207, 2013.
- Kendra, T. State counterclaims in investment arbitration: a new lease of life? *Arbitration international* (London) 29:4:575-606, 2013.
- Kenfack Douajni, G. L'arbitrage CCJA comme modèle pour l'élaboration d'un instrument universel en vue d'une meilleure circulation internationale des sentences. *Journal du droit international* (Paris) 140:4:1127-1143, 2013.
- Khatchadourian, M. La nouvelle loi Saoudienne sur l'arbitrage. *Revue de l'arbitrage* (Paris) 3:683-690, 2012.
- Knieper, J. The cultural background of arbitrators and its influence on the proceedings. *Harmonius - Journal of legal and social studies in South East Europe* (Belgrade) 1:99-108, 2013.
- Knieper, J. and E. Agaj. Një përhapje e gjerë dhe një fillim i mbarë në zbatimin e metodave të zgjidhjeve alternative të mosmarrveshjeve në Ballkanin Perëndimor. *Jeta juridike* (Tirana) 4:36-45, 2012. Translation of title: Wide awareness and

- good start in implementation of ADR methods in Western Balkans. In Albanian with extensive English summary.
- Knieper, R. Enforceability of arbitral awards in the context of investor-state disputes. *SchiedsVZ* (München) 11:6:307-309, 2013.
- Kreindler, R. Competence-competence in the face of illegality in contracts and arbitration agreements. *Recueil des cours: Académie de Droit International = Collected courses of the Hague Academy of International Law* (Leiden, The Netherlands) 361:131-482, 2012.
- Kröll, S. 50 Jahre UN-Übereinkommen über die Anerkennung und Vollstreckung ausländischer Schiedssprüche: Standortbestimmung und Zukunftsperspektive. *SchiedsVZ* (München) 7:1:40-53, 2009. Translation of title: 50 years of the New York Convention (1958): current status and future prospects.
- Kühn, W. Aktuelle Fragen zur Anwendung der New Yorker Konvention von 1958 im Hinblick auf die Anerkennung und Vollstreckung ausländischer Schiedssprüche: eine Betrachtung der deutschen Rechtsprechung. *SchiedsVZ* (München) 7:1:53-61, 2009. Translation of title: Current issues on the application of the New York Convention (1958) in terms of recognition and enforcement of foreign arbitral awards.
- Landolt, P. The inconvenience of principle: separability and Kompetenz-Kompetenz. *Journal of international arbitration* (Alphen aan den Rijn, The Netherlands) 30:5:511-530, 2013.
- Lee, J. UNCITRAL's unclear transparency instrument: fashioning the form and application of a legal standard ensuring greater disclosure in investor-state arbitrations. *Northwestern journal of international law & business* (Chicago, Ill.) 33:2:439-474, 2013.
- Lehmann, M. Official presentation of the draft Digest on the UNCITRAL Model Law on International Commercial Arbitration. *SchiedsVZ* (München) 3:3:150-152, 2005.
- Magee, S.J.E. and J. Mulholland. The enforceability of arbitration awards made pursuant to unilateral jurisdiction clauses. *Mealey's international arbitration report* (King of Prussia, Pa.) 28:10:25-31, 2013.
- Mantilla-Serrano, F. Colombia enacts a new international arbitration law. *Journal of international arbitration* (Alphen aan den Rijn, The Netherlands) 30:4:431-441, 2013.
- Marian, C. Who guards the guardians?: contracting states and available safeguards for ensuring arbitrators' impartiality and absence of bias in the ICSID Convention compared to the framework in the New York Convention. *Revista Română de arbitraj* (București) 28:4:1-13, 2013.
- Maurer, A. G. Begründet die völkerrechtswidrige Verweigerung der Vollstreckung eines ausländischen Schiedsspruchs einen Schadensersatzanspruch des Schiedsklägers?: die 'Durchsetzung' multilateraler völkerrechtlicher Verträge durch private Parteien. *SchiedsVZ* (München) 9:2:75-80, 2011. Translation of title: Reasoning behind the awarding of damages in the case of a refusal to enforce a foreign arbitration award? The enforcement of multilateral treaties by private parties.
- McConaughay, P. J. The role of arbitration in economic development and the creation of transnational legal principles. *Peking University School of transnational law review* (Beijing) 1:1:9-31, 2013.
- De Meulemeester, D. The new Belgian arbitration law. *ASA bulletin* (Alphen aan den Rijn, The Netherlands) 31:3:596-602, 2013.
- Miles, W. and J. Li. British Institute of International and Comparative Law Workshop on International Arbitration 2013: do England's expansive grounds for recourse

- increase delay and interference in arbitration? *Arbitration* (London) 80:1:35-47, 2014.
- Mindach, C. Novellierung des Schiedsrechts in der Republik Kasachstan. *SchiedsVZ* (München) 10:2:72-79, 2012. Translation of title: Amendment of the law on arbitration in Kazakhstan.
- Moens, G. A. and R. Sharma. The CEAC Hamburg Arbitration Rules: a European-Chinese trade-related adaptation of the revised UNCITRAL Arbitration Rules 2010. *Arbitration* (London) 79:2:138-157, 2013.
- Mouawad, C. and E. Silbert. A guide to interim measures in investor-state arbitration. *Arbitration international* (London) 29:3:381-434, 2013.
- Mourre, A. and M. Nioche. Le règlement Bruxelles I « refondu » évite le risque d'une régionalisation de l'arbitrage. *Cahiers de l'arbitrage = Paris journal of international arbitration* (Paris) 3:567-583, 2013.
- Murphy, J. C. UNCITRAL's efforts to ensure transparency: right back where we started from. *International arbitration law review* (London) 16:6:185-187, 2013.
- Musin V. A and O. Y. Skvortsov, eds. Международный коммерческий арбитраж: Учебник. St. Petersburg, Infotropic Media, 2012. 477 p. Translation of title: International commercial arbitration: textbook.
- Nottage, L. International commercial arbitration in Australia: what's new and what's next? *Journal of international arbitration* (Alphen aan den Rijn, The Netherlands) 30:5:465-494, 2013.
- De Oliveira, L.V.P. and I. Miranda. International public policy and recognition and enforcement of foreign arbitral awards in Brazil. *Journal of international arbitration* (Alphen aan den Rijn, The Netherlands) 30:1:49-70, 2013.
- Oseko Nyanchoka, A. The scope of arbitrability under Kenyan law. *Arbitration* (London) 79:3:273-278, 2013.
- Pareek, N. S. International commercial arbitration in India: governing law issues. *Uniform law review = Revue de droit uniforme* (Roma) 18:1:154-162, 2013.
- París, M. El necesario divorcio entre el código procesal civil y el arbitraje comercial. *Revista judicial* (San José) 109:145-150, 2013.
- Park, W. W. Convention violations and investment claims. *Arbitration international* (London) 29:2:175-186, 2013.
- Parkin, L. and S. Wade. Emergency arbitrators and the State Courts: will they work together? *Arbitration* (London) 80:1:48-54, 2014.
- Pauly, A. Arbitrajes más efectivos y eficientes. *Revista judicial* (San José) 107:89-98, 2013.
- Peiris, N. Appointment of an arbitrator by a court: a problem in the UNCITRAL Model Law! *Arbitration* (London) 80:1:117-119, 2014.
- Peng, H. and others, eds. Introduction to Cambodian law. Phnom Penh, Konrad Adenauer Stiftung, 2012. 496 p. Selected contents: Cambodian alternative dispute resolution / S. Austermiller, p. 183-195.
- Perales Viscasillas, M. del P. Arbitration in Spain: an international perspective of the modifications introduced by Law 11/2011. *World arbitration & mediation review* (Huntington, N.Y.) 6:2:385-404, 2012.
- \_\_\_\_\_. La notificación del arbitraje y su respuesta en el nuevo Reglamento de Arbitraje de la CNUDMI (2010). In Arbitraje internacional pasado, presente y futuro: libro homenaje a Bernardo Cremades e Yves Derains, Tomo I. Coordinadores: C. A. Soto Coaguila, D. Revoredo Marsano de Mur. Lima, Instituto Peruano de Arbitraje, 2013. p. 761-788.

- Pohl, J. and others. Dispute settlement provisions in international investment agreements: a large sample survey. *OECD working papers on international investment* (Paris) 2012:2.
- Polkinghorne, M. and M. Paralika. Revision of the UNCITRAL Arbitration Rules: the current state of play. *Contemporary Asia arbitration journal* (Taipei) 1:1:1-20, 2008.
- Pörnbacher, K. and others. Aktuelle Neuerungen im internationalen Schiedsrecht. *Betriebs-Berater* (Frankfurt am Main) 12:711-718, 2011. Translation of title: Recent innovations in international arbitration law.
- Primec, A. Prekoračitev pristojnosti arbitražnega senata kot ovira priznanju in izvršitvi odločb. *Slovenska arbitražna praksa* (Ljubljana) 2:2:24-30, 2013. Translation of title: Exceeding the jurisdiction of the arbitration tribunal as an obstacle to the recognition and enforcement of foreign judgments.
- Pullé, A. I. Hello Dallah: a perspective from Asia. *Comparative law yearbook of international business* (Alphen aan den Rijn, The Netherlands) 35:159-188, 2013.
- Rabkin, H. The Paris Arbitration Rules: towards a simplified arbitral procedure. *European international arbitration review* (Huntington, N.Y.) 2:1:53-93, 2013.
- Reichert, K. Commentary on the (relatively) new Irish arbitration law: the UNCITRAL Model Law in (almost) pure form. *Columbia journal of European law* (New York) 18:82-95, 2012.
- Republic of Korea. Ministry of Justice. 국제투자분쟁에서의 UNCITRAL 중재규칙 활용 실무. Seoul, Ministry of Justice, 2013. 280 p. Translation of title: A practical guide to using the UNCITRAL Arbitration Rules in international investment disputes.
- \_\_\_\_\_. 미얀마 중재법제 현대화 작업 지원방안 연구 = Research report on modernization of arbitration legislation in Myanmar. Seoul, Ministry of Justice, 2013. 110 p.
- Respondek, A. Asia arbitration guide. 3rd ed. Singapore, Respondek & Fan, 2013. 225 p.
- Reyes, A. How to be an arbitrator: a personal view. Hong Kong, s.n., 2012. 188 p.
- Rieder, M. S. and A. Ernst. UNCITRAL Arbitration Rules: institutional reform. *International arbitration law review* (London) 16:6:179-184, 2013.
- Rivkin, D. W. The impact of international arbitration on the rule of law. *Arbitration international* (London) 29:3:327-360, 2013.
- Rižnik, P. and J. Sekolec. Arbitražna pravila UNCITRAL: (spremenjena 2010). *Slovenska arbitražna praksa* (Ljubljana) 2:1:59-73, 2013. In Slovenian. Translation of title: UNCITRAL Arbitration Rules (as revised in 2010).
- Robinson, T. B. The recognition and enforcement of foreign arbitral awards as foreign judgments in the United States. *American review of international arbitration* (New York) 24:63-92, 2013.
- Rueda García, J. Á. Recognition and enforcement of foreign arbitral awards in Spain: a close look into the jurisprudence of the Superior Court of Justice of Catalonia (2011-2012). *Revista del club español del arbitraje* (Madrid) 17:97-123, 2013.
- Sacerdoti, G. Arbitration of investment disputes under UNCITRAL Rules and the choice of applicable law. In *Law in the service of human dignity: essays in honour of Florentino Feliciano*. S. Charnovitz, D. P. Steger and P. van den Bossche, eds. Cambridge, Cambridge University Press, 2005. p. 276-298.
- Salasky, J. and C. Montineri. UN Commission on International Trade Law and multilateral rule-making: consensus, sovereignty and the role of international

- organizations in the preparation of the UNCITRAL Rules on Transparency. *Transnational dispute management* (Voorburg, The Netherlands) 11:1, January 2014.
- \_\_\_\_\_. UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. *ASA bulletin* (Alphen aan den Rijn, The Netherlands) 31:4:774-796, 2013.
- Saleem, A. M. A critical study on how the Saudi Arbitration Code could be improved and on overcoming the issues of enforcing foreign awards in the country as a signatory state to the New York Convention. *CAR: CEPMLP annual review* (Dundee, Scotland) 2011/2012.
- Sattar, S. Bangladeshi courts at odds in respect of its powers in relation to arbitrations seated outside of Bangladesh. *International arbitration law review* (London) 16:1:19-24, 2013.
- Sawada, T. UNCITRAL 仲裁模範法の改定. *ジュリスト=Jurist* (Tokyo) 1319:145-153, 2006. Translation of title: Amendments to the UNCITRAL Model Law on International Commercial Arbitration (1985) (“UNCITRAL Arbitration Model Law (1985)”). In Japanese.
- Saxena, P. Pathological pace of dispute settlements in India: implications of an international arbitration. *Jindal journal of public policy* (Sonipat, India) 1:1:234-247, 2012.
- Scherer, M. Effects of foreign judgments relating to international arbitral awards: is the ‘judgment route’ the wrong road? *Journal of international dispute settlement* (Oxford) 4:3:587-628, 2013.
- Schütze, R. A. Institutional arbitration: article-by-article commentary. München, C.H. Beck, 2013. 1499 p.
- Schwenzer, I. H. and D. Tebel. The word is not enough: arbitration, choice of forum and choice of law clauses under the CISG. *ASA bulletin* (Alphen aan den Rijn, The Netherlands) 31:4:740-755, 2013.
- Smit, R. H. and others. Comparison of international arbitration rules. 4th ed. Huntington, N.Y, JurisNet, LLC, 2013. 181 p., Appendix: 132 p.
- Smuk, P., ed. The transformation of the Hungarian legal system 2010-2013. Budapest, Wolters Kluwer, 2013. 473 p. Selected contents: Hungarian regulation on arbitration / L. Milassin, p. 367-379.
- Soopramanien, S. O. The International Arbitration Act of Mauritius: addressing the challenges and opportunities of an emerging international arbitration center in Africa. *International arbitration law review* (London) 16:1:4-18, 2013.
- Srinivasan, B. UNCITRAL Arbitration Rules 2010: a review. *Christ University law journal* (Bangalore, India) 2:1:117-152, 2013.
- \_\_\_\_\_. UNCITRAL Arbitration Rules, 2010: comment on certain revisions. *Indian journal of arbitration law* (Jodhpur, India) 2:2, 2013.
- Strong, S. I. Beyond the self-execution analysis: rationalizing constitutional, treaty, and statutory interpretation in international commercial arbitration. *Virginia journal of international law* (Charlottesville, Va.) 53:3:499-573, 2013.
- Tao, J. Salient issues in arbitration in China. *American University international law review* (Washington, D.C.) 27:4:807-832, 2012.
- Templeman, J. Towards a truly international court of arbitration. *Journal of international arbitration* (Alphen aan den Rijn, The Netherlands) 30:3:197-220, 2013.
- Teshome, M. Laws and practice of commercial arbitration in Ethiopia: brief overview. *Abyssinialaw blog* (Ethiopia) 1 March 2013.

- The 'manifest disregard of law' doctrine and international arbitration in New York. *American review of international arbitration* (New York) 24:209-243, 2013.
- Tkemaladze, S. and I. Kacevska. Procedure and documents under Articles III and IV of New York Convention on Recognition and Enforcement of Arbitral Awards: comparative practice of Latvia and Georgia. *European scientific journal* (Ponta Delgada, Azores, Portugal) special edition vol. 1:452-463, December 2013.
- To, C. Do arbitrators really have a high degree of discretion in the management of the arbitration procedure: a Hong Kong perspective. *Korean arbitration review* (Seoul) 2:37-42, 2013.
- Ullah, I. Interim measures in arbitration under the Pakistani legal regime. *Arbitration international* (London) 29:4:653-670, 2013.
- UNCITRAL Model Arbitration Law: a solution? *Indonesia arbitration quarterly newsletter* (Jakarta) 12:4-28, 2013. Journal section dedicated to arbitration. Selected contents: The UNCITRAL Model Law on International Commercial Arbitration / C. Montineri, p. 4-5 -- Indonesia and UNCITRAL Model Law / M. Husseyn Umar, p. 6-7 -- The meaning of international arbitration / C. Ong, p. 8-15 -- UNCITRAL Arbitration Rules as procedures for ad hoc arbitration / F. H. Winarta, p. 16-22 -- BANI versus UNCITRAL Rules / M. Hasan, p. 23-28.
- United Nations. Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules (as revised in 2010). New York, United Nations, 2013. 25 p.
- \_\_\_\_\_. UNCITRAL rules on transparency in treaty-based investor-state arbitration. New York, United Nations, 2014. iii, 12 p.
- Varady, T. and others. International commercial arbitration: a transnational perspective. 5th ed. St. Paul, Minn., West, 2012. 1073 p.
- Verbist, H. De nieuwe Belgische Arbitragewet van 24 juni 2013. *Tijdschrift voor arbitrage* (Alphen aan den Rijn, The Netherlands) 3:155-160, 2013. Translation of title: The new Belgian Arbitration Law of 24 June 2013.
- \_\_\_\_\_. New Belgian Arbitration Law of 24 June 2013 and new CEPANI Arbitration Rules of 1 January 2013. *Journal of international arbitration* (Alphen aan den Rijn, The Netherlands) 30:5:597-618, 2013.
- \_\_\_\_\_. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. *b-arbitra* (Brussels) 4:303-332, 2013.
- \_\_\_\_\_. Transparency in treaty based investor state arbitration: the draft UNCITRAL rules on transparency. *Tijdschrift@ipr.be = Revue@dipr.be* (Belgium) 1:73-98, 2012.
- Vieira, I. de A. La Convention de Vienne et l'arbitrage: perspectives en droit brésilien. *Uniform law review = Revue de droit uniforme* (Roma) 18:3-4:606-629, 2013.
- Vorobey, D. V. CISG and arbitration clauses: issues of intent and validity. *Journal of law and commerce* (Pittsburgh, Pa.) 31:1:135-161, 2013.
- Waincymer, J. M. Procedure and evidence in international arbitration. Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2012. 1363 p.
- Wald, A. and others. Brazil as 'belle of the ball': the Brazilian courts' pro-arbitration stance (2011-2012). *Cahiers de l'arbitrage = Paris journal of international arbitration* (Paris) 2:381-396, 2013.
- Wang, G. and F. Yang, eds. Mediation in Asia Pacific: a practical guide to mediation and its impact on legal systems. Hong Kong, Wolters Kluwer, 2013. 559 p.

- Yong, F. L. 傅林涌: 适用 UNCITRAL 规则在中国仲裁的困局. *China arbitration online* (China) 30 November 2012. Translation of title: Applicability of the UNCITRAL Arbitration Rules to disputes in China.
- Yu, H.-L. Written arbitration agreements: what written arbitration agreements? *Civil justice quarterly* (Andover, U.K.) 32:1:68-92, 2012.
- Zakaria, T.A.B. International Arbitration Conference, Penang, Malaysia, August 2013: opening address by the Chief Justice of Malaysia. *Arbitration* (London) 79:4:389-392, 2013.
- Zekoll, J. and P. Giessen. Das ex parte-Eilverfahren und das Exequaturverfahren für schiedsgerichtliche Eilmaßnahmen im UNCITRAL Model Law: Anspruch und Wirklichkeit einer Reform. *SchiedsVZ* (München) 8:3:137-143, 2010. Translation of title: Ex parte summary proceedings and the exequatur procedure for interim measures under the UNCITRAL Arbitration Model Law (1985): claim and reality of reform.
- Zenginkuzucu, D. M. Uluslararası Ticaret ve Yatırım Uyumuzluklarının Dostane Çözümüne İlişkin Temel Metinler. Istanbul, Legal Yayıncılık A.S, 2013. 284 p. Translation of title: Basic documents on the amicable settlement of international trade and investment disputes.
- Zeynalova, Y. The law on recognition and enforcement of foreign judgments: is it broken and how do we fix it? *Berkeley journal of international law* (Berkeley, Calif.) 31:150-206, 2013.
- Zoroska-Kamilovska, T. Enforcing arbitral awards in the Republic of Macedonia. *Revista română de arbitraj* (Bucureşti) 29:1:16-26, 2014.

#### IV. International transport

- Abegaz Yimer, G. Adjudicatory jurisdiction in international carriage of goods by sea: would the Rotterdam Rules settle the controversy? *African journal of international and comparative law* (Edinburgh, U.K.) 21:3:467-488, 2013.
- Asariotis, R. Reflections on the Rotterdam Rules. In *Maritime law evolving: thirty years at Southampton*. M. Clarke, ed. Oxford, U.K., Hart Publishing, 2013, Ch. 6, p. 131-161.
- Berlingieri, F. Flexibility, foreseeability, reasonableness in maritime conventions and other relevant instruments. *Diritto marittimo* (Genova, Italy) 114:4:1017-1040, 2012.
- Bokareva, O. Liability for delay in multimodal transport under the Rotterdam Rules. *Journal of international maritime law* (Witney, U.K.) 19:3:237-255, 2013.
- Brooks, M. R. and J. Mackey. Will the Rotterdam Rules be accepted?: a liner cargo interest perspective. *Dalhousie law journal* (Halifax, N.S.) 35:2:267-294, 2012.
- Cachard, O. La clause said to contain et le trafic conteneurisé. *Droit maritime français* (Paris) 65:612-618, 2013.
- Delebecque, P. Le conteneur et les Règles de Rotterdam. *Droit maritime français* (Paris) 65:654-657, 2013.
- Estrella Faria, J. A. Uniform law and functional equivalence: diverting paths or stops along the same road? Thoughts on a new international regime for transport documents. *Elon law review* (Greensboro, N.C.) 2:1:1-37, 2011.
- Fujita, T. and S. Kozuka. 私法統一の現状と課題 (3) 海事・航空. *NBL* (Tokyo) 1001:54-62, 2013. Translation of title: Issues and current situations on unification of private law, vol.3: maritime and aviation law. In Japanese.
- Garo, P. L'adaptation du droit des transports maritimes au droit du commerce électronique. Marseille, Presses Universitaires d'Aix-Marseille (PUAM), 2012. 588 p.



- Kirval, L. European Union's stance on the Rotterdam Rules. *TransNav* (Gdynia, Poland) 6:4:555-562, 2012.
- Lamont-Black, S. Transferee liability under the Rotterdam Rules: a dance between flexibility and foreseeability. *Journal of international maritime law* (Witney, U.K.) 19:5:387-418, 2013.
- Maloof, D. T. and J. M. James. U.N.'s new compensation treaty: should United States ratify it? *New York law journal* (New York) 241:4, 2009.
- Ngamkan, G. Les «Règles de Rotterdam» 2008: le point de vue d'un avocat maritimiste africain. *Droit maritime français* (Paris) 755:151-158, 2014.
- Nicolas, P.-Y. Les Règles de Hambourg peuvent-elles s'appliquer conjointement avec la Convention de Bruxelles? *Droit maritime français* (Paris) 65:653:1014-1026, 2013.
- Pejović, C. Article 47(2) of the Rotterdam Rules: solution of old problems or a new confusion? *Journal of international maritime law* (Witney, U.K.) 18:5:348-363, 2012.
- Røsæg, E. Soft law in the conventions for the unification of maritime law. *Scandinavian studies in law* (Stockholm) 58:269-284, 2013.
- Soyer, B. and A. Tettenborn. Carriage of goods by sea, land and air: unimodal and multimodal transport in the 21st century. Abingdon, U.K., Informa Law, 2014. 430 p. Selected contents: International sale contracts and multimodal transport documents: two issues of significance / D. R. Thomas, Ch. 8 -- All tied up?: the potential impact of the Rotterdam Rules on shippers' obligations to carriers under bill of lading clauses in respect of goods shipped / D. Glass, Ch. 9 -- Multimodal bills of lading and limitation / C. Hancock, Ch. 10 -- The overall impact of the Rotterdam Rules on the liability of multimodal carriers and their subcontractors / R. Williams, Ch. 12 -- The European project on sustainable multimodal transport: is a harmonized liability system the right tool? / E. Eftestøl-Wilhelmsson, Ch. 13.
- Sturley, M. F. Amending the Rotterdam Rules: technical corrections to the U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. *Journal of international maritime law* (Witney, U.K.) 18:6:423-432, 2012.
- La Vega Justribó, B. de. Las Reglas de Rotterdam y el seguro marítimo de mercancías: su influencia en el proyecto de ley general de navegación marítima: la duración de la cobertura. *Cuadernos de derecho transnacional* (Madrid) 4:2:384-397, 2012.
- De Wit, R. Le conteneur dans les Règles de Rotterdam. *Droit maritime français* (Paris) 65:646-653, 2013.
- Zhao, L. Control of goods carried by sea and practice in e-commerce. *Journal of business law* (London) 6:585-597, 2013.

## V. International payments (including independent guarantees and standby letters of credit)

- Bertrams, R. F. Bank guarantees in international trade: the law and practice of independent (first demand) guarantees and standby letters of credit in civil law and common law jurisdictions. 4th ed. The Hague, Kluwer Law International, 2013. 612 p.
- Bollen, R. The law and regulation of payment services: a comparative study. Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2012. 275 p.
- Bostanji, S. La cour de cassation tunisienne à l'épreuve des «lois politiques»: réflexions à propos de l'arrêt n° 7146 du 26 avril 2005. *Revue de droit des*

- affaires internationales* = *International business law journal* (Paris) 4:513-526, 2007.
- Chhina, R. K. Standby letters of credit in international trade. Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2013. 229 p.
- Geva, B. The wireless wire: do M-payments and UNCITRAL Model Law on International Credit Transfers match? *Banking and finance law review* (Toronto) 27:249-264, 2012.
- Giménez Corte, C. Lex mercatoria, international arbitration and independent guarantees: transnational law and how nation states lost the monopoly of legitimate enforcement. *Transnational legal theory* (Oxford, U.K.) 3:4:345-370, 2012.
- Kelly-Louw, M. The law applicable to demand guarantees and standby letters of credit. *Annual review of international banking law and practice* (Montgomery Village, Md.) 2012:143-176.
- L'Heureux, N. L'harmonisation du droit dans les transferts de fonds internationaux par télécommunications interbancaires. *Cahiers de droit* (Québec) 32:4:937-970, 1991.
- Lowry, H. P. Early implementation of the 1988 UNCITRAL Bills and Notes Convention. In *Legal Harmonization in the Americas: Business Transactions, Bijuralism and the OAS*. General Secretariat of the Organization of American States, 2002.
- Morishita, T. 私法統一の現状と課題 (4) 金融・証券取引. *NBL* (Tokyo) 1002:57-64, 2013. Translation of title: Issues and current situations on unification of private law, vol.4: financial law and security trading. In Japanese.
- Sandoval López, R. La Ley Modelo de la CNUDMI sobre Transferencias Internacionales de Credito. *Revista de derecho* (Concepción, Chile) 61:193:69-91, 1993.
- Şit, B. Electronic retail payment systems in conflict of laws: basic electronic payment systems and determination of the applicable law in North America and Europe. *Ankara law review* (Ankara) 2:2:145-170, 2005.
- Yüksel, B. Facilitating international trade between Turkey and China by international payments via electronic funds transfer: problems and possible solutions under the UNCITRAL Model Law on International Credit Transfers. In *Reopening the silk road in the legal dialogue between Turkey and China*, International Law Conference, 12-14 June 2012, Law School of Marmara University, Istanbul, Turkey. C. Yenidünya, M. Erkan & R. Asat (eds.). *Adalet Yayinevi*, 2013, p. 365-393.

## VI. Electronic commerce

- Abubakar, A. S. and F. O. Adebayo. Analysis of Electronic Transactions Bill in Nigeria: issues and prospects. *Mediterranean journal of social sciences* (Rome) 5:2:215-220, January 2014.
- Álvarez, J. F. and others. Problemas de la regulación actual en materia de comercio electrónico, armonización y firmas digitales. *EAFIT Journal of international law* (Medellin, Colombia) 3:2:41-53, 2012.
- Anagnostopoulou, D. E-commerce in international and European Union law: the policy of the European Union on Digital Agenda and Strategy 2020. *Jean Monnet Chair 'New Dimensions on EU Legal Studies' research essays series* (Thessaloniki, Greece) 11, 2013.
- Anzaki, M. B. E-commerce in Africa: trends and laws. *Lawyers chronicle* (Jos, Nigeria) 50:5-28, 2013.

- Asia Pacific Economic Cooperation (Organization). Guidelines for paperless business environment in the APEC region. Seoul, Asia Pacific Women's Information Network Center (APWINC), 2010. 40 p.
- Bindman, J. C. The spam filter ate my email: when are electronic records received? *William Mitchell law review* (St. Paul, Minn.) 39:4:1295-1332, 2013.
- Boukbir, A. La preuve électronique des transactions commerciales au Maroc à la lumière de la loi n° 53-05. *Maroc droit* (Morocco) 7 January 2013.
- Cañete Ribeiro, G. El consentimiento en las contrataciones electrónicas, según la legislación paraguaya. *Revista jurídica Universidad Americana* (Asunción) 2012:87-101.
- Choi, K. J. KLRI-UNCITRAL joint research: perspectives and trends [III], UNCITRAL WG IV 에서의 전자양도기록에 관한 논의 분석. Seoul, Korea Legislation Research Institute, 2013. 141 p. Translation of title: Analysis of discussions on electronic transferable records in UNCITRAL WG IV.
- Common Market for Eastern and Southern Africa. COMESA model law on electronic transactions and guide to enactment 2010. Lusaka, COMESA, 2010. 118 p.
- Corbran Rizzo, R. El e-commerce internacional en el contrato de transporte aéreo de mercaderías. *Asociación Latino Americana de Derecho Aeronáutico y Espacial, ALADA doctrina* 18 January 2013.
- Dreyzin de Klor, A. Derecho aplicable al comercio electrónico. *Revista seqüência* (Florianópolis, Brazil) 50:273-299, 2005.
- East African Community. Draft EAC legal framework for cyberlaws. Arusha, United Republic of Tanzania, EAC, 2008. 61 p.
- Fernando, J. E-transactions to m-transactions: serving the next generation of customers. Beyond Growth - A Formula for Success. Association of Professional Bankers - Sri Lanka. 25th Anniversary Convention 2013, [8-9 October, Colombo].
- Flanagan, A. E-Commerce: the regulation of insurance in the age of the internet. In *Research handbook on international insurance law and regulation*. Cheltenham, U.K., Edward Elgar, 2012. p. 569-602.
- Garo, P. L'adaptation du droit des transports maritimes au droit du commerce électronique. Marseille, Presses Universitaires d'Aix-Marseille (PUAM), 2012. 588 p.
- Gregory, J. D. Must e-signatures be reliable? *Digital evidence and electronic signature law review* (Bedfordshire, U.K.) 10:67-70, 2013.
- Hao, F. S. The admission of electronic evidence under the Electronic Transactions Act and the Evidence Act: *Mitfam International Ltd v Motley Resources Pte Ltd* [2013] SGHC 270. *SLW commentary* (Singapore) 2, January 2014.
- Ikeh, E.-S. Nigeria: towards a legal framework for the development of e-commerce in Nigeria: issues & prospects. *Mondaq business briefing* (London) February 19, 2014.
- Kabre, D. W. La conclusion des contrats électroniques: plaidoyer pour un processus renouvelé. *Revue du droit des technologies de l'information* (Bruxelles) 50:5-28, 2013.
- Kalemi, E. and D. Ndreka. The impact of information technology in electronic contracting. *Academic journal of interdisciplinary studies* (Rome) 1:2:225-235, 2012.
- Konwencja ONZ o wykorzystywaniu komunikacji elektronicznej w kontraktach międzynarodowych. *VaGla.pl* 26 November 2006. Translation of the United Nations Convention on the Use of Electronic Communications in International

- Contracts (New York, 2005) (“United Nations Convention on Electronic Contracting (2005)”). In Polish.
- Kuspraningrum, E. Keabsahan kontrak elektronik dalam UU ITE ditinjau dari pasal 1320 KUHPerdata dan UNCITRAL Model Law on Electronic Commerce. *Risalah Hukum* (Samarinda, Indonesia) 7:2:182-194, 2011. Translation of title: The legality of electronic contract in the enactment of information and electronical transaction derived from Article 1320 Civil Code and the UNCITRAL Model Law on Electronic Commerce (1996). In Indonesian.
- Lacoursière, M. and E. Vézina. La sécurité des opérations bancaires par internet. *Revue juridique Thémis* (Montréal) 41:89-156, 2007.
- Lee, J. S. UNCITRAL 과 전자상거래: 전자양도기록에 대한 논의. In *Global legal issues 2012*. Seoul, Korea Legislation Research Institute, 2012. v. 2, p. 71-86. Translation of title: UNCITRAL and e-commerce: discussions on electronic transferable records.
- MacDonald, E. Dispatching the dispatch rule?: the postal rule, e-mail, revocation and implied terms. *Web journal of current legal issues* (Belfast, U.K.) 19:2, 2013.
- Mason, S. Table of electronic signature legislation. *Digital evidence and electronic signature law review* (Bedfordshire, U.K.) 10:233-248, 2013.
- Mik, E. Certainty at last?: A ‘new’ framework for electronic contracting in Singapore. *Journal of international commercial law and technology* 8:3:160-178, 2013.
- Morais Neto, A. S. de and others. Brazil and international conflicts resolution in e-commerce: analysis of conflict resolution based on the CISG. *Transnational corporations and development: challenges and opportunities in Brazil, Maringá, Brazil, July 24-26, 2013*.
- Palanissamy, A. Legal issues in e-commerce and e-contracting: an overview of initiatives in Malaysia. *International journal of e-education, e-business, e-management and e-learning* (Singapore) 3:2:173-177, 2013.
- Poland. Konwencja Narodów Zjednoczonych o wykorzystaniu komunikacji elektronicznej w kontraktach międzynarodowych. [Warsaw, Ministerstwo Gospodarki, 2006. 9 p. Translation of the United Nations Convention on Electronic Contracting (2005). In Polish.
- Rahbari, E. and A. Rezaee. The role of electronic agents in concluding the contract. *Law quarterly* (Tehran) 41:4:159-178, 2013. In Persian (Farsi), title translated from the original.
- Šarepaš, N. Закључивање уговора електронским путем. *Yearbook of the faculty of law in East Sarajevo* (Sarajevo) 2:2:149-162, 2011. Translation of title: Electronic contract formation. In Serbian.
- Shah, H. and A. Srivastava. Authentication and recognition issues in cross-border single window. *Journal of world trade* (Alphen aan den Rijn, The Netherlands) 47:6:1225-1258, 2013.
- Šimbelytė, S. and G. Nemeikšis. The usage problems of electronic document as evidence in the civil process in Lithuania. *Proceedings of the Conference of Turiba University, XIV International Scientific Conference, Creating the Future: Communication, Education, Business, Riga, 30 May 2013*, p. 40-50.
- Sorieul, R. and others. Establishing a legal framework for electronic commerce: the work of the United Nations Commission on International Trade Law (UNCITRAL). *International lawyer* (Chicago, Ill.) 35:1:107-122, 2001.
- Srivastava, A. and M. Koekemoer. The legal recognition of electronic signatures in South Africa: a critical overview. *African journal of international and comparative law* (Edinburgh, U.K.) 21:3:427-446, 2013.

- Stemler, A. and A. H. Raymond. Promoting investment in agricultural production: increasing legal tools for small to medium farmers. *Ohio State entrepreneurial business law journal* (Columbus, Ohio) 8:2:281-325, 2013.
- Sun, Z. On electronic contract and legal requirement of its written form. *Journal of Chongqing University of Posts and Telecommunications (social science)* (China) 20:3:42-47, 2008. Translation of title. In Chinese.
- The second international conference on comparative law and global common law: Asian law in the 21st century & inaugural meeting of the Asia Academy of Comparative Law, conference papers, College of Comparative Law, China University of Political Science and Law, September 27-28, 2013, [Beijing, China]. Beijing, China University of Political Science and Law, 2013. 426 p. Selected contents: International law on e-commerce: legal issues and impact on developing countries / R. Mohamad, p. 362-372 -- A comparative analysis of the United Nations Convention on the Use of Electronic Communications in International Contracts: the Australian experience / A. Davidson, p. 399-426.
- Thomaeus, B. Elektroniska avtal i internationell handel. In *Elektronisk signering: en antologi*. Stockholm, Norstedts Juridik, 2013. p. 25-34. Translation of title: Electronic contracts in international trade.
- Uchida, T. 電子商取引と法 UNCITRAL「電子商取引法モデル法」および通産省「電子商取引環境整備研究会中間報告」を中心として. *NBL* (Tokyo) Pt. 1 in 600:38-45, 1996; Pt. 2 in 601:16-23, 1996; Pt. 3 in 602:32-39, 1996; Pt. 4 in 603:28-45, 1996. Translation of title: Electronic commerce and law: regarding UNCITRAL Model Law on Electronic Commerce (1996) and the Ministry of International Trade and Industry 'Report on Environmental Improvement in the Field of Electronic Transactions.' In Japanese.
- \_\_\_\_\_. 電子認証・電子署名をめぐる法制度整備のあり方. *NBL* (Tokyo) Pt. 1 in 675:6-11, 1999; Pt. 2 in 676:29-32, 1999. Translation of title: Improvement of legal systems related to electronic certification and electronic signature. In Japanese.
- UNCTAD. Review of e-commerce legislation harmonization in the Association of Southeast Asian Nations. New York, UN, 2013. 58 p.
- 全球化背景下的国际贸易规则一体化: 中国与世界 = Unification of international trade rules in the age of globalization: China and the world [conference papers], October 19-20, 2013, [Beijing, China]. Beijing, Tsinghua University, 2013. 178 p. Selected contents: The Need for CISG countries to adopt the Electronic Communications Convention / S. Eiselen.

## VII. Security interests (including receivables financing)

- Akseli, N. O. The interpretation philosophy of secured transaction law conventions. *European review of private law = Revue européenne de droit privé = Europäische Zeitschrift für Privatrecht* (Alphen aan den Rijn, The Netherlands) 21:5&6:1299-1318, 2013.
- Akseli, N. O., ed. Availability of credit and secured transactions in a time of crisis. Cambridge, U.K., Cambridge University Press, 2013. 311 p. Contents: Money, bank debt and business cycles: between economic development and financial crises / D. Bholat, p. 11-32 -- Secured transactions law reform, UNCITRAL and the export of foreign legal models / G. McCormack, p. 33-60 -- Commentary on the availability of credit / J. Gray, p. 61-63 -- International organizations as global lawmakers: seven shifts in practice for secured transactions law and beyond / T.C. Halliday, p. 67-89 -- The creation of international commercial law standards by international financial institutions: why they do it and whether they should / S.V. Bazinas, p. 91-99 -- The power of secured transactions law and the challenge of its reform / F. Dahan, p. 101-122 -- Commentary on the involvement of international financial institutions in secured transactions law

reform / L. Mistelis, p. 123-129 -- The utility and efficacy of the UNCITRAL Legislative Guide on Secured Transactions / S.V. Bazinas, p. 133-184 -- The utility and efficacy of the UN Convention on the Assignment of Receivables and the facilitation of credit / N.O. Akseli, p. 185-215 -- Commentary on the availability of credit and the utility and efficacy of UNCITRAL's legislative efforts in secured transactions / H.D. Gabriel, p. 217-223 -- How may international standards assist law reform in England? / A.H. Raymond, p. 227-262 -- Commentary on the international standards and the reform of English personal property securities law / N. McGarth, p. 263-273 -- The UNCITRAL Legislative Guide on Secured Transactions as a model for law reform: some conclusions / H. Beale, p. 275-292.

Bazinas, S. V. The draft pledge provisions of the Russian Civil Code and the Russian law on pledge compared with the UNCITRAL Legislative Guide on Secured Transactions. In *Global legal issues 2012*. Seoul, Korea Legislation Research Institute, 2012. v. 1, p. 567-598.

\_\_\_\_\_. Towards global harmonization of conflict-of-laws rules in the area of secured financing: the conflict-of-laws recommendations of the UNCITRAL Legislative Guide on Secured Transactions. In *A commitment to private international law: essays in honour of Hans van Loon = Un engagement au service du droit international privé: mélanges en l'honneur de Hans van Loon*. Cambridge, U.K., Intersentia, 2013. p. 1-15.

Chung, C. 지식재산담보권의 실행과 우선순위에 관한 개선안. *지식재산연구 = The journal of intellectual property* (Seoul) 8:4:69-92, 2013. Translation of title: Proposals to improve the enforcement and priority of a security right in intellectual property.

Cowan, R. and D. Gallagher. The International Registry for Aircraft Equipment: the first seven years, what we have learned. *Uniform commercial code law journal* (St. Paul, Minn.) 45:3:225-257, 2014.

Dubovec, M. and C. Kambili. Using the UNCITRAL Legislative Guide as a tool for a secured transactions reform in Sub-Saharan Africa: the case of Malawi. *Arizona journal of international and comparative law* (Tucson, Ariz.) 30:2:163-185, 2013.

Dubovec, M. and B. Osei-Tutu. Reforming secured transactions laws in Africa: the first African collateral registry in Ghana. *Uniform commercial code law journal* (New York) 45:1:77-122, 2013.

Gout, O. Quel droit commun pour les sûretés réelles? *Revue trimestrielle de droit civil* (Paris) 2:255-274, 2013.

Kieninger, E.-M. Collateralisation of contracts. *European review of contract law* (Berlin) 9:4:430-454, 2013.

Kubassek, T. Securing performance in project finance: is the pledge of receivables enough for creditors as a main security interest to secure their claims? Budapest, Central European University, 2013. 60 p. Short Thesis (LL.M.) - Central European University, 2013.

Kurowski, W. Materiały: przelew wierzytelności w handlu międzynarodowym. *Kwartalnik prawa prywatnego* (Kraków, Poland) 13:4:1133-1193, 2004. Translation of title: Materials: transfer of debt in international trade.

Kwon, Y. J. KLRI-UNCITRAL joint research: perspectives and trends [V], UNCITRAL 담보등기제도 실행에 관한 지침 연구. Seoul, Korea Legislation Research Institute, 2013. 132 p. Translation of title: Study on the UNCITRAL Guide on the Implementation of a Security Rights Registry (2013) ("UNCITRAL Security Rights Registry Guide (2013)").

Morán Bovio, D. Excepciones oponibles y derechos de compensación en Carit. In *Estudios de derecho mercantil: liber amicorum Profesor Dr. Francisco Vicent*

Chuliá, F. Alonso Espinosa and others (eds.). Valencia, Spain, Tirant Lo Blanch, 2013, p. 1207-1220.

\_\_\_\_\_. Exclusiones y límites en Carit (Convention on Assignment of Receivables in International Trade). In Estudios de derecho mercantil: libro homenaje al Prof. Dr. Dr.h.c. José Antonio Gómez Segade. A. M. Tobío Rivas y A. Fernández-Albor Baltar (eds.). Madrid, Marcial Pons, 2013, p. 997-1008.

\_\_\_\_\_. Pago liberatorio del deudor en CARIT: un estudio sobre su Art. 17. In Estudios de derecho del comercio internacional: homenaje a Juan Manuel Gómez Porrúa. G. J. Jiménez Sánchez, A. Díaz-Moreno (eds.). Madrid, Marcial Pons, 2013, p. 515-525.

Okino, M. 私法統一の現状と課題(2) 担保取引. *New business law* (Tokyo) 999:58-66, 2013. Translation of title: Current state of the unification of private law: vol.2 secured transactions.

Pestana de Vasconcelos, L. M. A monetarização dos créditos de empréstimos bancários. *Revista de derecho bancario y bursátil* (Valladolid, Spain) 131:61-94, 2013. Translation of title: The monetization of bank loan claims.

\_\_\_\_\_. A monetarização dos créditos de empréstimos bancários. *Revista da banca* (Lisboa) 73:33-75, 2012. Translation of title: The monetization of bank loan credits.

Raymond, A. H. Cross-border secured transactions: ongoing issue and possible solutions. *Elon law review* (Greensboro, N.C.) 2:1:87-107, 2011.

Special issue: IP valuation and IP finance. *지식재산연구 = The journal of intellectual property* (Seoul) 8:3:1-186, 2013. Special journal issue. Selected contents: 지식재산권 담보설정계약 당사자의 권리와 의무 / 박현일 (translation of title: IP security agreement, and rights and obligations of relevant parties / Whon-II Park), p. 1-32 -- 지식재산 담보의 범위와 공시제도 / 손승우, 김태원 (translation of title: The scope and public notice of security rights in intellectual property / Seungwoo Son, Taewon Kim), p. 33-54 -- 지식재산담보권의 우선권과 담보권의 실행에 관한 연구 -UNCITRAL 담보거래 입법론을 중심으로 - / 박재원 (translation of title: A study on priority and enforcement of a security right in intellectual property / Jaewon Park), p. 65-98. In Korean.

Stemler, A. and A. H. Raymond. Promoting investment in agricultural production: increasing legal tools for small to medium farmers. *Ohio State entrepreneurial business law journal* (Columbus, Ohio) 8:2:281-325, 2013.

Vermeille, S. and A. Bézert. L'analyse économique du droit au secours du droit des sûretés et du droit des procédures collectives. *Recueil Dalloz* (Paris) 5:289-290, 2014.

Vymazal, L. Český rejstřík zástav ve světle registru zajišťovacích práv UNCITRALu: (zpráva z 22. zasedání Komise OSN pro mezinárodní obchodní právo). *Právník* (Praha) 152:5:532-533, 2013. Translation of title: Czech registry of pledges in view of the UNCITRAL Security Rights Registry Guide (2013).

## VIII. Procurement

Bernstein, A. J. Price realism analysis in fixed-price contracting: improving the evaluation process. *Public contract law journal* (Washington, D.C.) 42:793-825, 2013.

Corvaglia, M. A. and L. Marschner. The complementarity of soft and hard law in public procurement: between harmonization and resilience. Biennial conference of the American Society of International Law International Economic Law Interest Group, November 29 - December 1, 2012, George Washington University School of Law.

- Gargrave, R. and E. Niewiadomska. Supporting reforms: the EBRD-UNCITRAL public procurement initiative = Поддержка реформ: Инициатива ЕБРР-ЮНСИТРАЛ в сфере госзакупок. *Law in transition online* (London) 36-47, October 2013.
- Linarelli, J. The WTO Agreement on Government Procurement and the UNCITRAL Model Procurement Law: a view from outside the region. *Asian journal of WTO and international health law and policy* (Taipei) 1:61-84, 2006.
- Nicholas, C. A reform tool: the 2011 UNCITRAL Model Law on Public Procurement and its Guide to Enactment = Инструмент реформ: Типовой закон ЮНСИТРАЛ о государственных закупках 2011 года и Руководство по его принятию. *Law in transition online* (London) 23-33, October 2013.
- Quinot, G. and S. Arrowsmith. Public procurement regulation in Africa. Cambridge, Cambridge University Press, 2013. 429 p.
- Son, S. W. KLRI-UNCITRAL joint research: perspectives and trends [IV], UNCITRAL 정부조달 모델법 분석을 통한 국내 조달법령의 개선 방안 연구. Seoul, Korea Legislation Research Institute, 2013. 82 p. Translation of title: Study on reform of the Korean legal system through analysis of the UNCITRAL Model Law on Public Procurement (2011) (“UNCITRAL Procurement Model Law (2011)”).
- \_\_\_\_\_. UNCITRAL 정부조달 모델법의 개정과 우리의 과제. In *Global legal issues 2012*. Seoul, Korea Legislation Research Institute, 2012. v. 2, p. 39-56. Translation of title: Recent work on the revision of the UNCITRAL Procurement Model Law (2011).
- Udeh, K. T. A critical appraisal of Kenya’s supplier review system in the light of international standards. *Public procurement law review* (London) 22:5:183-203, 2013.
- Williams-Elegbe, S. The reform and regulation of public procurement in Nigeria. *Public contract law journal* (Washington, D.C.) 41:2:339-366, 2012.
- \_\_\_\_\_. The World Bank’s influence on procurement reform in Africa. *African journal of international and comparative law = Revue africaine de droit international et comparé* (Edinburgh) 21:1:95-119, 2013.

## IX. Insolvency

- Böger, O. Close-out netting provisions in private international law and international insolvency law (part I and II). *Uniform law review = Revue de droit uniforme* (Roma) 18:2:232-261, 2013; 18:3-4:532-563, 2013.
- Buckel, E. Curbing comity: the increasingly expansive public policy exception of Chapter 15. *Georgetown journal of international law* (Washington, D.C.) 44:3:1281-1311, 2013.
- ‘Centre of main interests’ and the directors’ responsibilities in the twilight zone: update on the current and future work of UNCITRAL Working Group V (insolvency law). *INSOL world* (London) 4th quarter 2013, p. 32-33.
- Chung, J. J. In re Qimonda AG: the conflict between comity and the public policy exception in Chapter 15 of the Bankruptcy Code. *Boston University international law journal* (Boston, Mass.) 32:91-121, 2014.
- Cooper, N. Tenth Joint INSOL International, UNCITRAL and World Bank Multinational Colloquium on Insolvency. *INSOL world* (London) third quarter 2013, p. 33.
- Giorgini, G. C. Le centre des intérêts principaux du débiteur insolvable en droit comparé. *Revue internationale de droit comparé* (Paris) 64:4:867-902, 2012.



- Gong, X. To recognise or not to recognise?: comparative study of Lehman Brothers cases in Mainland China and Taiwan. *International corporate rescue* (Hertfordshire, U.K.) 10:4:240-247, 2013.
- Good, M. D. Chapter 15 of the United States Bankruptcy Code: a very brief overview for non-US practitioners. *International corporate rescue* (Hertfordshire, U.K.) 10:4:248-254, 2013.
- INSOL Europe. Revision of the European Insolvency Regulation. Clifton, U.K., INSOL Europe, 2012. 194 p.
- Khizunova, A. N. Протоколы банкротства как особый 'инструмент' регулирования процедуры трансграничного банкротства (Часть 1, 2). *Moscow journal of international law* (Москва) 1:89:109-128, 2013; 2:90:103-123, 2013. Translation of title: Cross-border insolvency protocols as special instrument of cross-border insolvency proceedings (part 1 and 2).
- Majumdar, A. B. The UNCITRAL Model Law on Cross-Border Insolvency. *India law journal* 2:1, 2009.
- Masoud, B. S. The Kenyan Insolvency Bill 2010: a cross-border insolvency analysis. *Open University law journal* (Dar Es Salaam) 4:1:195-207, 2013.
- \_\_\_\_\_. Towards adoption of the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency in Kenya. *International insolvency review* (London) 22:3:211-222, 2013.
- McCarthy, L. American isolationism: a commentary on COMI under the Model Law as it is applied in the United States. *International corporate rescue* (Hertfordshire, U.K.) 10:6:372-377, 2013.
- McCarthy, L. and A. Welch. The UNCITRAL Model Law narrative in Australia: a review of the cases. *International corporate rescue* (Hertfordshire, U.K.) 10:5:302-309, 2013.
- Méjan, L.M.C. Constitutional challenges of the Mexican Insolvency Law (Ley de Concursos Mercantiles). *Law and business review of the Americas* (Dallas, Tex.) 19:35-53, 2013.
- Mevorach, I. On the road to universalism: a comparative and empirical study of the UNCITRAL Model Law on Cross-Border Insolvency. *European business organization law review* (The Hague) 12:517-557, 2011.
- Omar, P. J. Après Rubin: le déluge?: thoughts on the future of common law insolvency cooperation. *International corporate rescue* (Hertfordshire, U.K.) 10:6:356-364, 2013.
- \_\_\_\_\_. The landscape of international insolvency law. *International insolvency review* (Chichester, U.K.) 11:173-200, 2002.
- \_\_\_\_\_. The limits of co-operation at common law: Rubin v Eurofinance in the Supreme Court. *International corporate rescue* (Hertfordshire, U.K.) 10:2:106-116, 2013.
- \_\_\_\_\_. The revenue rule and cooperation under the Model Law: an Australian perspective. *International corporate rescue* (Hertfordshire, U.K.) 11:1:17-24, 2014.
- Paul, L., ed. Global insolvency & restructuring review 2013/14. Colchester, Essex, U.K., Euromoney Trading Ltd, 2013. 248 p. Selected contents: Facilitating cross-border cooperation and coordination in insolvency: the work of the United Nations Commission on International Trade Law / J. Clift, p.17-20.
- Sakkas, Y. Transnational insolvency proceedings in Greece: Law 3858/2010 adopting the UNCITRAL Model Law. *INSOL world* (London) 20-21, second quarter 2013.

- Springer, T. S. Paved with good intentions: creditors face a new roadblock to recovery in Mexican bankruptcies. *Law and business review of the Americas* (Dallas, Tex.) 18:83-93, 2012.
- Tett, R. and E. Norman. Directors' duties in a distressed scenario: where are we now? *International corporate rescue* (Hertfordshire, U.K.) 11:1:4-7, 2014.
- Trionfetti, K. The use of foreign avoiding powers under Section 1521(A)(7) in Chapter 15 cases. *American Bankruptcy Institute law review* (Alexandria, Va.) 21:279-300, 2013.
- United Nations. UNCITRAL legislative guide on insolvency law, part four: directors' obligations in the period approaching insolvency. New York, United Nations, 2013. iii, 32 p.
- \_\_\_\_\_. UNCITRAL model law on cross-border insolvency with guide to enactment and interpretation. New York, United Nations, 2014. vi, 122 p.
- Wouters, N. and A. Raykin. Corporate group cross-border insolvencies between the United States and European Union: legal and economic developments. *Emory bankruptcy developments journal* (Atlanta, Ga.) 29:387-423, 2013.

## X. International construction contracts

[No publications recorded under this heading.]

## XI. International countertrade

- Lambrecht, R. J. The big payback: how corruption taints offset agreements in international defense trade. *Air force law review* (Washington D.C.) 70:73-118, 2013.
- Milenković-Kerković, T. Drafting an international buy-back agreement. *Facta universitatis - economics and organization* (Niš, Serbia) 2:2:165-180, 2004.

## XII. Privately financed infrastructure projects

- Donaldson, M. and B. Kingsbury. Ersatz normativity or public law in global governance: the card case of international prescriptions for national infrastructure regulation. *Chicago journal of international law* (Chicago, Ill.) 14:1-51, 2013.

## XIII. Online dispute resolution

- Al Swelmiyeen, I. and others. Online arbitration in the social network world: mobile justice on iPhones. *Information & communications technology law* (Abingdon, U.K.) 22:2:146-164, 2013.
- Albornoz, M. M. and N. González Martín. Feasibility analysis of online dispute resolution in developing countries. *Inter-American law review* (Coral Gables, Fla.) 44:1:39-61, 2012.
- Betancourt, J. C. and E. Zlatanska. Online dispute resolution (ODR): what is it, and is it the way forward? *Arbitration* (London) 79:3:256-264, 2013.
- Bozkurt Yüksel, A. E. Online international arbitration. *Ankara law review* (Ankara) 4:1:83-93, 2007.
- Brand, R. A. Transaction planning using rules on jurisdiction and the recognition and enforcement of judgments. *Recueil des cours: Académie de Droit International = Collected courses of the Hague Academy of International Law* (Leiden, The Netherlands) 358:9-262, 2011.

- Cortés, P. and F. Esteban de la Rosa. Building a global redress system for low-value cross-border disputes. *International and comparative law quarterly* (London) 62:2:407-440, 2013.
- Dennis, M. J. UNCITRAL ODR: legal framework for global e-commerce dispute resolution. *HUFS law review* (Seoul) 36:4:25-38, 2012.
- Gregory, J. D. Current practices of online dispute resolution: the Canadian experience. *HUFS law review* (Seoul) 36:4:3-13, 2012.
- Johnson, P. Enforcing online arbitration agreements for cross-border consumer small claims in China and the United States. *Hastings international and comparative law review* (San Francisco, Calif.) 36:577-602, 2013.
- Lee, B. J. KLRI-UNCITRAL joint research: perspectives and trends [II], UNCITRAL W/G III에서의 소비자중재의 규율과 구체적인 조문에 대한 분석. Seoul, Korea Legislation Research Institute, 2013. 131 p. Translation of title: Analysis to the specific languages of generic procedural rules and the regulation for consumer arbitration, conducted by Working Group III of UNCITRAL.
- Madrid Parra, A. Directiva 2013/11 (ADR) y Reglamento 524/2013 (ODR): una apuesta europea por la solución alternativa de litigios y en pro del comercio electrónico transfronterizo. *Spain arbitration review* (Madrid) 18:37-62, 2013.
- Oh, S. G. ODR 과 중재절차 - UNCITRAL 에서의 논의를 중심으로. In *Global legal issues 2012*. Seoul, Korea Legislation Research Institute, 2012. v. 2, p. 57-70. Translation of title: UNCITRAL discussions on ODR and arbitration procedure.
- Philippe, M. Where is everyone going with online dispute resolution (ODR). *Revue de droit des affaires internationales = International business law journal* (Paris) 2:167-201, 2002.
- Souissi, H. Online dispute resolution in international electronic operations. *Cyberjustice laboratory working paper* (Montréal) 5, 2013.
- Vilalta Nicuesa, A. E. Contratación transnacional y acceso a la justicia: mecanismos de resolución electrónica de disputas. *Revista crítica de derecho inmobiliario* (Madrid) 732:2065-2147, 2012.
- \_\_\_\_\_. *Mediación y arbitraje electrónicos*. Cizur Menor, Spain, Thomson Reuters Aranzadi, 2013. 471 p.



### III. CHECK-LIST OF DOCUMENTS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

<i>Document Symbol</i>	<i>Title or description</i>	<i>Location in Present Volume</i>
<b>A. List of documents before the Commission at its forty-seventh session</b>		
<i>1. General series</i>		
A/CN.9/793	Provisional agenda, annotations thereto and scheduling of meetings of the forty-seventh session	Not reproduced
A/CN.9/794	Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-ninth session (Vienna, 16-20 September 2013)	Part two, chap. I, A
A/CN.9/795	Report of Working Group III (Online Dispute Resolution) on the work of its twenty-eighth session (Vienna, 18-22 November 2013)	Part two, chap. II, A
A/CN.9/796	Report of Working Group VI (Security Interests) on the work of its twenty-fourth session (Vienna, 2-6 December 2013)	Part two, chap. III, A
A/CN.9/797	Report of Working Group IV (Electronic Commerce) on the work of its forty-eighth session (Vienna, 9-13 December 2013)	Part two, chap. IV, A
A/CN.9/798	Report of Working Group V (Insolvency Law) on the work of its forty-fourth session (Vienna, 16-20 December 2013)	Part two, chap. V, A
A/CN.9/799	Report of Working Group II (Arbitration and Conciliation) on the work of its sixtieth session (New York, 3-7 February 2014)	Part two, chap. I, C
A/CN.9/800	Report of Working Group I (MSMEs) on the work of its twenty-second session (New York, 10-14 February 2014)	Part two, chap. VI, A
A/CN.9/801	Report of Working Group III (Online Dispute Resolution) on the work of its twenty-ninth session (New York, 24-28 March 2014)	Part two, chap. II, E
A/CN.9/802	Report of Working Group VI (Security Interests) on the work of its twenty-fifth session (New York, 31 March - 4 April 2014)	Part two, chap. III, C
A/CN.9/803	Report of Working Group V (Insolvency Law) on the work of its forty-fifth session (New York, 21-25 April 2014)	Part two, chap. V, D
A/CN.9/804	Report of Working Group IV (Electronic Commerce) on the work of its forty-ninth session (New York, 28 April-2 May 2014)	Part two, chap. IV, D
A/CN.9/805	Bibliography of recent writings related to the work of UNCITRAL	Part three, chap. II
A/CN.9/806	Status of conventions and model laws	Part two, chap. X
A/CN.9/807	Planned and possible future work - Part I	Part two, chap. VII, A
A/CN.9/808	Activities of the UNCITRAL Regional Centre for Asia and the Pacific	Not reproduced
A/CN.9/809	Coordination activities	Part two, chap. XI
A/CN.9/810	Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts	Not reproduced
A/CN.9/811	Draft Model Law on Secured Transactions: Security Interests in Non-Intermediated Securities	Not reproduced
A/CN.9/812	Settlement of commercial disputes: Draft convention on transparency in treaty-based investor-State arbitration	Not reproduced

A/CN.9/813 and Add.1	Settlement of commercial disputes: Draft convention on transparency in treaty-based investor-State arbitration, Compilation of comments	Not reproduced
A/CN.9/814 and Add.1-5	UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)	Not reproduced
A/CN.9/815	Report of the Fourth International Insolvency Law Colloquium	Not reproduced
A/CN.9/816	Planned and possible future work - Part I	Part two, chap. VII, B
A/CN.9/817	Online dispute resolution for cross-border electronic commerce transactions: Proposal by the Governments of Colombia, Kenya, Honduras and the United States of America	Not reproduced
A/CN.9/818	Technical cooperation and assistance	Part two, chap. IX, A
A/CN.9/819	Possible future work in Public-Private Partnerships (PPPs) Discussion paper - Part I	Part two, chap. VII, C
A/CN.9/820	Possible future work in Public-Private Partnerships (PPPs) Discussion paper - Part II	Part two, chap. VII, D
A/CN.9/821	Possible future work in Public-Private Partnerships (PPPs) Report of the UNCITRAL colloquium on PPPs	Part two, chap. VII, E
A/CN.9/822	Planned and possible future work - Part III, Proposal by the Government of the United States of America: future work for Working Group II	Part two, chap. VII, F
A/CN.9/823	Planned and possible future work - Part IV, Proposal by the Government of Canada: possible future work on electronic commerce - legal issues affecting cloud computing	Part two, chap. VII, G

## *2. Restricted series*

A/CN.9/XLVII/CRP.1 and Add.1-17	Draft report of the United Nations Commission on International Trade Law on the work of its forty-seventh session	Not reproduced
A/CN.9/XLVII/CRP.2	Draft convention on transparency in treaty-based investor-State arbitration	Not reproduced
A/CN.9/XLVII/CRP.3	Draft decision adopting the Convention on Transparency in Treaty-Based Investor-State Arbitration	Not reproduced

## *3. Information series*

A/CN.9/XLVII/1 NF/1	List of participants	Not reproduced
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## **B. List of documents before the Working Group on Arbitration and Conciliation at its fifty-ninth session**

### *1. Working papers*

A/CN.9/WG.II/WP.178	Annotated provisional agenda	Not reproduced
A/CN.9/WG.II/WP.179	Settlement of commercial disputes: Application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration to existing investment treaties - Draft convention	Part two, chap. I, B

### 2. *Restricted series*

A/CN.9/WG.II/LIX/CRP.1 and Add.1-4 Draft report of Working Group II (Arbitration and Conciliation) on the work of its fifty-ninth session Not reproduced

A/CN.9/WG.II/LIX/CRP.2 Preparation of a convention on transparency in treaty-based investor-State arbitration - Proposal received from the Delegation of the United States of America on articles 1 and 4 of the draft convention (as contained in document A/CN.9/784, paras. 4-18) Not reproduced

### 3. *Information series*

A/CN.9/WG.II/LIX/INF/1 List of participants Not reproduced

## C. List of documents before the Working Group on Arbitration and Conciliation at its sixtieth session

### 1. *Working papers*

A/CN.9/WG.II/ WP.180 Annotated provisional agenda Not reproduced

A/CN.9/WG.II/ WP.181 Settlement of commercial disputes: Draft convention on transparency in treaty-based investor-State arbitration Part two, chap. I, D

### 2. *Restricted series*

A/CN.9/WG.II/LX/CRP.1 and Add. 1-4 Draft report of Working Group II (Arbitration and Conciliation) on the work of its sixtieth session Not reproduced

A/CN.9/WG.II/LX/CRP.2 Comments received from the delegation of the United States of America on document A/CN.9/WG.II/ WP.181 Not reproduced

A/CN.9/WG.II/LX/CRP.3 Comments received from the Delegation of Japan on document A/CN.9/WG.II/ WP.181 Not reproduced

A/CN.9/WG.II/LX/CRP.4 Settlement of commercial disputes: Draft convention on transparency in treaty-based investor-State arbitration - Revised draft articles 3 and 5 of the transparency convention Not reproduced

### 3. *Information series*

A/CN.9/WG.II/LX/INF/1 List of participants Not reproduced

## D. List of documents before the Working Group on Online Dispute Resolution at its twenty-eighth session

### 1. *Working papers*

A/CN.9/WG.III/ WP.122 Annotated provisional agenda Not reproduced

A/CN.9/WG.III/ WP.123 and Add.1 Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules Part two, chap. II, B

A/CN.9/WG.III/ WP.124 Online dispute resolution for cross-border electronic commerce transactions: overview of private enforcement mechanisms Part two, chap. II, C

A/CN.9/WG.III/ WP.125	Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules - Proposal by the Governments of Colombia, Honduras, Kenya and the United States	Part two, chap. II, D
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**2. Restricted series**

A/CN.9/WG.III/X XVIII/ CRP.1 and Add. 1-4	Draft report of Working Group III (Online dispute resolution) on the work of its twenty- eighth session	Not reproduced
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**3. Information series**

A/CN.9/WG.III/XX VIII/INF/1	List of participants	Not reproduced
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**E. List of documents before the Working Group on Online Dispute Resolution at its twenty-ninth session**

**1. Working papers**

A/CN.9/WG.III/ WP.126	Annotated provisional agenda	Not reproduced
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A/CN.9/WG.III/ WP.127 and Add.1	Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules	Part two, chap. II, F
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A/CN.9/WG.III/ WP.128	Online dispute resolution for cross-border electronic commerce transactions: draft guidelines	Part two, chap. II, G
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**2. Restricted series**

A/CN.9/WG.III/X XIX/ CRP.1 and Add. 1-4	Draft report of Working Group III (Online dispute resolution) on the work of its twenty- ninth session	Not reproduced
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A/CN.9/WG.III/X XIX/ CRP.2	Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules	Not reproduced
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**3. Information series**

A/CN.9/WG.III/XX IX/INF/1	List of participants	Not reproduced
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**F. List of documents before the Working Group on Security Interests at its twenty-fourth session**

**1. Working papers**

A/CN.9/WG.VI/ WP.56	Annotated provisional agenda	Not reproduced
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A/CN.9/WG.VI/ WP.57 and Add.1- 4	Draft Model Law on Secured Transactions	Part two, chap. III, B
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### 2. *Restricted series*

A/CN.9/WG.VI/ XXIV/ CRP.1 and Add. 1-4	Draft report of Working Group VI (Security Interests) on the work of its twenty-fourth session	Not reproduced
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### 3. *Information series*

A/CN.9/WG.VI/X XIV/INF/1	List of participants	Not reproduced
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## G. List of documents before the Working Group on Security Interests at its twenty-fifth session

### 1. *Working papers*

A/CN.9/WG.VI/ WP.58	Annotated provisional agenda	Not reproduced
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A/CN.9/WG.VI/ WP.59 and Add.1	Draft Model Law on Secured Transactions session	Part two, chap. III, D
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### 2. *Restricted series*

A/CN.9/WG.VI/ XXV/ CRP.1 and Add. 1-4	Draft report of Working Group VI (Security Interests) on the work of its twenty-fifth session	Not reproduced
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A/CN.9/WG.VI/ XXV/ CRP.2	Draft Model Law on Secured Transactions	Not reproduced
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### 3. *Information series*

A/CN.9/WG.VI/X XV/INF/1	List of participants	Not reproduced
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## H. List of documents before the Working Group on Electronic Commerce at its forty-eighth session

### 1. *Working papers*

A/CN.9/WG.IV/ WP.123	Annotated provisional agenda	Not reproduced
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A/CN.9/WG.IV/ WP.124 and Add.1	Draft provisions on electronic transferable records	Part two, chap. V, B
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A/CN.9/WG.IV/ WP.125	Legal issues relating to the use of electronic transferable records	Part two, chap. V, C
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### 2. *Restricted series*

A/CN.9/WG.IV/X LVIII/ CRP.1 and Add.1-4	Draft report of Working Group IV (Electronic Commerce) on the work of its forty-eighth session	Not reproduced
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### 3. *Information series*

A/CN.9/WG.IV/X LVIII/INF.1	List of participants	Not reproduced
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**I. List of documents before the Working Group on Electronic Commerce at its forty-ninth session**

*1. Working papers*

A/CN.9/WG.IV/ WP.127	Annotated provisional agenda	Not reproduced
A/CN.9/WG.IV/ WP.128 and Add.1	Draft provisions on electronic transferable records	Part two, chap. IV, D

*2. Restricted series*

A/CN.9/WG.IV/I L/ CRP.1 and Add.1-4	Draft report of Working Group IV (Electronic Commerce) on the work of its forty-ninth session	Not reproduced
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*3. Information series*

A/CN.9/WG.IV/I L/INF.1	List of participants	Not reproduced
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**J. List of documents before the Working Group on Insolvency Law at its forty-fourth session**

*1. Working papers*

A/CN.9/WG.V/ WP.116	Annotated provisional agenda	Not reproduced
A/CN.9/WG.V/ WP.117	Background information on topics comprising the current mandate of Working Group V and topics for possible future work	Part two, chap. V, B
A/CN.9/WG.V/ WP.118	Recent developments concerning the global and regional initiatives regarding the insolvency of large and complex financial institutions	Part two, chap. V, C

*2. Restricted series*

A/CN.9/WG.V/ XLIV CRP.1 and Add. 1	Draft report of Working Group V (Insolvency Law) on the work of its forty-fourth session	Not reproduced
A/CN.9/WG.V/ XLIV CRP.2	Fourth International Insolvency Law Colloquium - Report of the proceedings of 16 December 2013	Not reproduced
A/CN.9/WG.V/ XLIV CRP.3	Fourth International Insolvency Law Colloquium - Report of the proceedings of 17 December 2013	Not reproduced
A/CN.9/WG.V/ XLIV CRP.4	Fourth International Insolvency Law Colloquium - Report of the proceedings of 18 December 2013	Not reproduced

*3. Information series*

A/CN.9/WG.V/ XLIV/ INF/1	List of participants	Not reproduced
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**K. List of documents before the Working Group on Insolvency Law at its forty-fifth session**

*1. Working papers*

A/CN.9/WG.V/ WP.119	Annotated provisional agenda	Not reproduced
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A/CN.9/WG.V/ WP.120	Facilitating the cross-border insolvency of multinational enterprise groups	Part two, chap. V, E
A/CN.9/WG.V/ WP.121	Mechanisms suitable for the insolvency of micro, small and medium-sized enterprises: the UNCITRAL Legislative Guide on Insolvency Law	Part two, chap. V, F
A/CN.9/WG.V/ WP.122	Comments of the United States of America on A/CN.9/WG.V/WP.120	Part two, chap. V, G

### *2. Restricted series*

A/CN.9/WG.V/ XLV/ CRP.1 and Add. 1-4	Draft report of Working Group V (Insolvency Law) on the work of its forty-fifth session	Not reproduced
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### *3. Information Series*

A/CN.9/WG.V/ XLV/ INF.1	List of participants	Not reproduced
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## **L. List of documents before the Working Group Micro, small and medium-sized enterprises (MSMEs) at its twenty-second session**

### *1. Working papers*

A/CN.9/WG.I/ WP.80	Annotated provisional agenda	Not reproduced
A/CN.9/WG.I/ WP.81	Selected activities of international and intergovernmental organizations to promote micro, small and medium-sized enterprises	Part two, chap. VI, B
A/CN.9/WG.I/ WP.82	Micro, small and medium-sized enterprises - Features of simplified business incorporation regimes	Part two, chap. VI, C
A/CN.9/WG.I/ WP.83	Observations by the Government of Colombia	Part two, chap. VI, D

### *2. Restricted series*

A/CN.9/WG.I/X XII/ CRP.1 and Add. 1-4	Draft report of Working Group I (MSMEs) on the work of its twenty second session	Not reproduced
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### *3. Information Series*

A/CN.9/WG.I/X XII/ INF.1	List of participants	Not reproduced
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#### IV. LIST OF DOCUMENTS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW REPRODUCED IN PREVIOUS VOLUMES OF THE *YEARBOOK*

The present list indicates the particular volume, year, part and chapter where documents relating to the work of the United Nations Commission on International Trade Law were reproduced in previous volumes of the *Yearbook*; documents that do not appear in the list here were not reproduced in the *Yearbook*. The documents are divided into the following categories:

1. Reports on the annual sessions of the Commission
2. Resolutions of the General Assembly
3. Reports of the Sixth Committee
4. Extracts from the reports of the Trade and Development Board, United Nations Conference on Trade and Development
5. Documents submitted to the Commission (including reports of the meetings of Working Groups)
6. Documents submitted to the Working Groups:
  - (a) Working Group I:  
Time-Limits and Limitation (Prescription) (1969 to 1971); Privately Financed Infrastructure Projects (2001 to 2003); Procurement (2004 to 2012); MSME's (as of 2014)
  - (b) Working Group II:  
International Sale of Goods (1968 to 1978); International Contract Practices (1981 to 2000); Arbitration and Conciliation (as of 2000)
  - (c) Working Group III:  
International Legislation on Shipping (1970 to 1975); Transport Law (2002 to 2008); Online Dispute Resolution (as of 2010)
  - (d) Working Group IV:  
International Negotiable Instruments (1973 to 1987); International Payments (1988 to 1992); Electronic Data Interchange (1992 to 1996); Electronic Commerce (as of 1997)
  - (e) Working Group V:  
New International Economic Order (1981 to 1994); Insolvency Law (1995 to 1999); Insolvency Law (as of 2001)\*
  - (f) Working Group VI:  
Security Interests (as of 2002)\*\*
7. Summary records of discussions in the Commission
8. Texts adopted by Conferences of Plenipotentiaries
9. Bibliographies of writings relating to the work of the Commission.

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\* For its 23rd session (Vienna, 11-22 December 2000), this Working Group was named Working Group on International Contract Practices (see the report of the Commission on its 33rd session A/55/17, para.186).

\*\* At its 35th session, the Commission adopted one-week sessions, creating six working groups.

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
<b>1. Reports on the annual sessions of the Commission</b>		
A/7216 (first session)	Volume I: 1968-1970	Part two, I, A
A/7618 (second session)	Volume I: 1968-1970	Part two, II, A
A/8017 (third session)	Volume I: 1968-1970	Part two, III, A
A/8417 (fourth session)	Volume II: 1971	Part one, II, A
A/8717 (fifth session)	Volume III: 1972	Part one, II, A
A/9017 (sixth session)	Volume IV: 1973	Part one, II, A
A/9617 (seventh session)	Volume V: 1974	Part one, II, A
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A/33/17 (eleventh session)	Volume IX: 1978	Part one, II, A
A/34/17 (twelfth session)	Volume X: 1979	Part one, II, A
A/35/17 (thirteenth session)	Volume XI: 1980	Part one, II, A
A/36/17 (fourteenth session)	Volume XII: 1981	Part one, A
A/37/17 and Corr.1 (fifteenth session)	Volume XIII: 1982	Part one, A
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3494 (XXX)	Volume VII: 1976	Part one, I, C
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62/24	Volume XLI: 2010	Part one, D
62/32	Volume XLI: 2010	Part one, D
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#### 4. Extracts from the reports of the Trade and Development Board of the United Nations Conference on Trade and Development

A/7214	Volume I: 1968-1970	Part two, I, B, 1
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#### 5. Documents submitted to the Commission, including reports of meetings of working groups

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A/CN.9/33	Volume I: 1968-1970	Part three, I, B
A/CN.9/34	Volume I: 1968-1970	Part three, I, C, 2
A/CN.9/35	Volume I: 1968-1970	Part three, I, A, 2
A/CN.9/38	Volume I: 1968-1970	Part three, II, A, 2
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A/CN.9/41	Volume I: 1968-1970	Part three, II, A
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A/CN.9/116 and annex I and II	Volume VII: 1976	Part two, I, 1-3
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A/CN.9/690	Volume XLI:2010	Part two, IV, C
A/CN.9/691	Volume XLI:2010	Part two, III, C
A/CN.9/692	Volume XLI:2010	Part two, V, A
A/CN.9/693	Volume XLI:2010	Part three, III
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A/CN.9/695	Volume XLI:2010	Part two, VII
A/CN.9/702 and Add.1	Volume XLI:2010	Part two, V, B
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A/CN.9/707 and Add.1	Volume XLI:2010	Part two, IX
A/CN.9/709	Volume XLI:2010	Part two, V, D
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A/CN.9/712	Volume XLII:2011	Part two, I, A
A/CN.9/713	Volume XLII:2011	Part two, II, A
A/CN.9/714	Volume XLII:2011	Part two, III, A
A/CN.9/715	Volume XLII:2011	Part two, IV, A
A/CN.9/716	Volume XLII:2011	Part two, V, A
A/CN.9/717	Volume XLII:2011	Part two, I, D
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A/CN.9/719	Volume XLII:2011	Part two, III, C
A/CN.9/721	Volume XLII:2011	Part two, V, C
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A/CN.9/723	Volume XLII:2011	Part two, IX
A/CN.9/724	Volume XLII:2011	Part two, VIII
A/CN.9/725	Volume XLII:2011	Part two, X
A/CN.9/728 and Add.1	Volume XLII:2011	Part two, VI, A
A/CN.9/729 and Add.1-8	Volume XLII:2011	Part two, II, E
A/CN.9/730 and Add.1-2	Volume XLII:2011	Part two, II, F
A/CN.9/731 and Add.1-9	Volume XLII:2011	Part two, II, G
A/CN.9/733 and Add.1	Volume XLII:2011	Part two, IV, E
A/CN.9/746 and Add.1	Volume XLIII:2012	Part two, I, G
A/CN.9/747 and Add.1	Volume XLIII:2012	Part two, I, H
A/CN.9/749	Volume XLIII:2012	Part two, XI
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A/CN.9/763	Volume XLIV: 2013	Part two, VI, A
A/CN.9/764	Volume XLIV: 2013	Part two, V, A
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A/CN.9/766	Volume XLIV: 2013	Part two, IV, F
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A/CN.9/771	Volume XLIV: 2013	Part two, VI, B
A/CN.9/772	Volume XLIV: 2013	Part three, II
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A/CN.9/786	Volume XLIV: 2013	Part two, I, H
A/CN.9/788	Volume XLIV: 2013	Part two, VII, E
A/CN.9/789	Volume XLIV: 2013	Part two, VII, F
A/CN.9/790	Volume XLIV: 2013	Part two, VII, G

## 6. Documents submitted to Working Groups

### (a) Working Group I

#### (i) Time-limits and Limitation (Prescription)

A/CN.9/WG.1/WP.9	Volume II: 1971	Part two, I, C, 1
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#### (ii) Privately Financed Infrastructure Projects

A/CN.9/WG.I/WP.29 and Add.1-2	Volume XXXIV: 2003	Part two, I, B
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#### (iii) Procurement

A/CN.9/WG.I/WP.31	Volume XXXVI: 2005	Part two, II, B
A/CN.9/WG.I/WP.32	Volume XXXVI: 2005	Part two, II, C
A/CN.9/WG.I/WP.34 and Add.1-2	Volume XXXVI: 2005	Part two, II, E
A/CN.9/WG.I/WP.35 and Add.1	Volume XXXVI: 2005	Part two, II, F
A/CN.9/WG.I/WP.36	Volume XXXVI: 2005	Part two, II, G
A/CN.9/WG.I/WP.38 and Add.1	Volume XXXVII: 2006	Part two, III, B
A/CN.9/WG.I/WP.39 and Add.1	Volume XXXVII: 2006	Part two, III, C
A/CN.9/WG.I/WP.40 and Add.1	Volume XXXVII: 2006	Part two, III, D
A/CN.9/WG.I/WP.42 and Add.1	Volume XXXVII: 2006	Part two, III, F
A/CN.9/WG.I/WP.43 and Add.1	Volume XXXVII: 2006	Part two, III, G
A/CN.9/WG.I/WP.44 and Add.1	Volume XXXVII: 2006	Part two, III, H
A/CN.9/WG.I/WP.45 and Add.1	Volume XXXVII: 2006	Part two, III, I
A/CN.9/WG.I/WP.47	Volume XXXVIII: 2007	Part two, II, B
A/CN.9/WG.I/WP.48	Volume XXXVIII: 2007	Part two, II, C
A/CN.9/WG.I/WP.50	Volume XXXVIII: 2007	Part two, II, E
A/CN.9/WG.I/WP.51	Volume XXXVIII: 2007	Part two, II, F
A/CN.9/WG.I/WP.52 and Add.1	Volume XXXVIII: 2007	Part two, II, G
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A/CN.9/WG.I/WP.55	Volume XXXIX: 2008	Part two, II, C
A/CN.9/WG.I/WP.56	Volume XXXIX: 2008	Part two, II, D
A/CN.9/WG.I/WP.58	Volume XXXIX: 2008	Part two, II, F
A/CN.9/WG.I/WP.59	Volume XXXIX: 2008	Part two, II, G
A/CN.9/WG.I/WP.61	Volume XL: 2009	Part two, I, B
A/CN.9/WG.I/WP.62	Volume XL: 2009	Part two, I, C
A/CN.9/WG.I/WP.63	Volume XL: 2009	Part two, I, D
A/CN.9/WG.I/WP.64	Volume XL: 2009	Part two, I, E
A/CN.9/WG.I/WP.66 and Add.1-5	Volume XL: 2009	Part two, I, G
A/CN.9/WG.I/WP.68 and Add.1	Volume XL: 2009	Part two, I, I
A/CN.9/WG.I/WP.69 and Add.1-5	Volume XL: 2009	Part two, I, J
A/CN.9/WG.I/WP.71 and Add.1-8	Volume XLI: 2010	Part two, IV, B
A/CN.9/WG.I/WP.73 and Add.1-8	Volume XLI: 2010	Part two, IV, D
A/CN.9/WG.I/WP.75 and Add.1-8	Volume XLII: 2011	Part two, II, B
A/CN.9/WG.I/WP.77 and Add.1-9	Volume XLII: 2011	Part two, II, D
A/CN.9/WG.I/WP.79 and Add.1-19	Volume XLIII: 2012	Part two, VI, B

### (b) Working Group II

#### (i) International Sale of Goods

A/CN.9/WG.2/WP.1	Volume I: 1968-1979	Part three, I, A, 2
A/CN.9/WG.2/WP.6	Volume II: 1971	Part two, I, A, 1
A/CN.9/WG.2/WP.8	Volume III: 1972	Part two, I, A, 1
A/CN.9/WG.2/WP.9	Volume III: 1972	Part two, I, A, 2

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A/CN.9/WG.2/WP.10	Volume III: 1972	Part two, I, A, 3
A/CN.9/WG.2/WP.11	Volume III: 1972	Part two, I, A, 4
A/CN.9/WG.2/WP.15	Volume IV: 1973	Part two, I, A, 1
A/CN.9/WG.2/WP.16	Volume IV: 1973	Part two, I, A, 2
A/CN.9/WG.2/WP.15/Add.1	Volume V: 1974	Part two, I, 3
A/CN.9/WG.2/WP.17/Add.1	Volume V: 1974	Part two, I, 4
A/CN.9/WG.2/WP.17/Add.2	Volume V: 1974	Part two, I, 4
A/CN.9/WG.2/WP.20	Volume VI: 1975	Part two, I, 4
A/CN.9/WG.2/WP.2 and Add.1-2	Volume VI: 1975	Part two, I, 3
A/CN.9/WG.2/WP.26 and Add.1 and appendix I	Volume VIII: 1977	Part two, I, C
A/CN.9/WG.2/WP.27	Volume IX: 1978	Part two, I, B
A/CN.9/WG.2/WP.28	Volume IX: 1978	Part two, I, B
<i>(ii) International Contract Practices</i>		
A/CN.9/WG.II/WP.33 and Add.1	Volume XII: 1981	Part two, I, B, 1 and 2
A/CN.9/WG.II/WP.35	Volume XIII: 1982	Part two, III, B
A/CN.9/WG.II/WP.37	Volume XIV: 1983	Part two, III, B, 1
A/CN.9/WG.II/WP.38	Volume XIV: 1983	Part two, III, B, 2
A/CN.9/WG.II/WP.40	Volume XIV: 1983	Part two, III, D, 1
A/CN.9/WG.II/WP.41	Volume XIV: 1983	Part two, III, D, 2
A/CN.9/WG.II/WP.42	Volume XIV: 1983	Part two, III, D, 3
A/CN.9/WG.II/WP.44	Volume XV: 1984	Part two, II, A, 2(a)
A/CN.9/WG.II/WP.45	Volume XV: 1984	Part two, II, A, 2(b)
A/CN.9/WG.II/WP.46	Volume XV: 1984	Part two, II, A, 2(c)
A/CN.9/WG.II/WP.48	Volume XV: 1984	Part two, II, B, 3(a)
A/CN.9/WG.II/WP.49	Volume XV: 1984	Part two, II, B, 3(b)
A/CN.9/WG.II/WP.50	Volume XV: 1984	Part two, II, B, 3(c)
A/CN.9/WG.II/WP.52 and Add.1	Volume XVI: 1985	Part two, IV, B, 1
A/CN.9/WG.II/WP.53	Volume XVI: 1985	Part two, IV, B, 3
A/CN.9/WG.II/WP.55	Volume XVII: 1986	Part two, III, B, 1
A/CN.9/WG.II/WP.56	Volume XVII: 1986	Part two, III, B, 2
A/CN.9/WG.II/WP.58	Volume XVIII: 1987	Part two, III, B
A/CN.9/WG.II/WP.60	Volume XIX: 1988	Part two, II, B
A/CN.9/WG.II/WP.62	Volume XX: 1989	Part two, IV, B, 1
A/CN.9/WG.II/WP.63	Volume XX: 1989	Part two, IV, B, 2
A/CN.9/WG.II/WP.65	Volume XXI: 1990	Part two, IV, B
A/CN.9/WG.II/WP.67	Volume XXII: 1991	Part two, III, B, 1
A/CN.9/WG.II/WP.68	Volume XXII: 1991	Part two, III, B, 2
A/CN.9/WG.II/WP.70	Volume XXII: 1991	Part two, III, D, 1
A/CN.9/WG.II/WP.71	Volume XXII: 1991	Part two, III, D, 2
A/CN.9/WG.II/WP.73 and Add.1	Volume XXIII: 1992	Part two, IV, B
A/CN.9/WG.II/WP.76 and Add.1	Volume XXIV: 1993	Part two, II, B, 1
A/CN.9/WG.II/WP.77	Volume XXIV: 1993	Part two, II, B, 2
A/CN.9/WG.II/WP.80	Volume XXV: 1994	Part two, II, B
A/CN.9/WG.II/WP.83	Volume XXVI: 1995	Part two, I, B
A/CN.9/WG.II/WP.87	Volume XXVIII: 1997	Part two, II, B
A/CN.9/WG.II/WP.89	Volume XXVIII: 1997	Part two, II, D, 1
A/CN.9/WG.II/WP.90	Volume XXVIII: 1997	Part two, II, D, 2
A/CN.9/WG.II/WP.91	Volume XXVIII: 1997	Part two, II, D, 3
A/CN.9/WG.II/WP.93	Volume XXIX: 1998	Part two, I, B
A/CN.9/WG.II/WP.96	Volume XXIX: 1998	Part two, I, D
A/CN.9/WG.II/WP.98	Volume XXX: 1999	Part two, I, B
A/CN.9/WG.II/WP.99	Volume XXX: 1999	Part two, I, C
A/CN.9/WG.II/WP.100	Volume XXX: 1999	Part two, I, D
A/CN.9/WG.II/WP.102	Volume XXX: 1999	Part two, I, F
A/CN.9/WG.II/WP.104	Volume XXXI: 2000	Part two, I, B
A/CN.9/WG.II/WP.105	Volume XXXI: 2000	Part two, I, C
A/CN.9/WG.II/WP.106	Volume XXXI: 2000	Part two, I, D

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<i>(iii) International Commercial Arbitration</i>		
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A/CN.9/WG.II/WP.111	Volume XXXII: 2001	Part two, III, C
A/CN.9/WG.II/WP.113 and Add.1	Volume XXXII: 2001	Part two, III, E
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A/CN.9/WG.II/WP.116	Volume XXXIII: 2002	Part two, I, C
A/CN.9/WG.II/WP.118	Volume XXXIII: 2002	Part two, I, E
A/CN.9/WG.II/WP.119	Volume XXXIII: 2002	Part two, I, F
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A/CN.9/WG.II/WP.123	Volume XXXIV: 2003	Part two, III, D
A/CN.9/WG.II/WP.125	Volume XXXV: 2004	Part two, II, B
A/CN.9/WG.II/WP.127	Volume XXXV: 2004	Part two, II, D
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A/CN.9/WG.II/WP.131	Volume XXXVI: 2005	Part two, III, B
A/CN.9/WG.II/WP.132	Volume XXXVI: 2005	Part two, III, C
A/CN.9/WG.II/WP.134	Volume XXXVI: 2005	Part two, III, E
A/CN.9/WG.II/WP.136	Volume XXXVII: 2006	Part two, II, B
A/CN.9/WG.II/WP.137 and Add.1	Volume XXXVII: 2006	Part two, II, C
A/CN.9/WG.II/WP.138	Volume XXXVII: 2006	Part two, II, D
A/CN.9/WG.II/WP.139	Volume XXXVII: 2006	Part two, II, F
A/CN.9/WG.II/WP.141	Volume XXXVII: 2006	Part two, II, G
A/CN.9/WG.II/WP.145 and Add.1	Volume XXXVIII: 2007	Part two, III, D
A/CN.9/WG.II/WP.147 and Add.1	Volume XXXIX: 2008	Part two, III, B
A/CN.9/WG.II/WP.149	Volume XXXIX: 2008	Part two, III, D
A/CN.9/WG.II/WP.151 and Add.1	Volume XL: 2009	Part two, II, B
A/CN.9/WG.II/WP.152	Volume XL: 2009	Part two, II, C
A/CN.9/WG.II/WP.154	Volume XL: 2009	Part two, II, E
A/CN.9/WG.II/WP.154/Add.1	Volume XLI: 2010	Part two, I, B
A/CN.9/WG.II/WP.157 and Add.1-2	Volume XLI: 2010	Part two, I, D
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A/CN.9/WG.II/WP.160 and Add.1	Volume XLII: 2011	Part two, I, C
A/CN.9/WG.II/WP.162 and Add.1	Volume XLII: 2011	Part two, I, E
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A/CN.9/WG.II/WP.164	Volume XLII: 2011	Part two, I, G
A/CN.9/WG.II/WP.166 and Add.1	Volume XLIII: 2012	Part two, I, B
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A/CN.9/WG.II/WP.173	Volume XLIV: 2013	Part two, I, C
A/CN.9/WG.II/WP.174	Volume XLIV: 2013	Part two, I, D
A/CN.9/WG.II/WP.176 and Add.1	Volume XLIV: 2013	Part two, I, F
A/CN.9/WG.II/WP.177	Volume XLIV: 2013	Part two, I, G
<b>(c) Working Group III</b>		
<i>(i) International Legislation on Shipping</i>		
A/CN.9/WG.III/WP.6	Volume IV: 1973	Part two, IV, 2
A/CN.9/WG.III/WP.7	Volume IV: 1973	Part two, IV, 3
A/CN.9/WG.III/WP.11	Volume V: 1974	Part two, III, 3
<i>(ii) Transport Law</i>		
A/CN.9/WG.III/WP.21 and Add.1	Volume XXXIII: 2002	Part two, VI, B
A/CN.9/WG.III/WP.23	Volume XXXIV: 2003	Part two, IV, B
A/CN.9/WG.III/WP.25	Volume XXXIV: 2003	Part two, IV, D
A/CN.9/WG.III/WP.26	Volume XXXIV: 2003	Part two, IV, E
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A/CN.9/WG.III/WP.29	Volume XXXIV: 2003	Part two, IV, H
A/CN.9/WG.III/WP.30	Volume XXXIV: 2003	Part two, IV, I
A/CN.9/WG.III/WP.28/Add.1	Volume XXXV: 2004	Part two, III, B
A/CN.9/WG.III/WP.32	Volume XXXV: 2004	Part two, III, C
A/CN.9/WG.III/WP.33	Volume XXXV: 2004	Part two, III, D
A/CN.9/WG.III/WP.34	Volume XXXV: 2004	Part two, III, E
A/CN.9/WG.III/WP.36	Volume XXXV: 2004	Part two, III, G
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A/CN.9/WG.III/WP.45	Volume XXXVI: 2005	Part two, IV, H
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A/CN.9/WG.III/WP.47	Volume XXXVI: 2005	Part two, IV, J
A/CN.9/WG.III/WP.49	Volume XXXVII: 2006	Part two, IV, B
A/CN.9/WG.III/WP.50/Rev.1	Volume XXXVII: 2006	Part two, IV, C
A/CN.9/WG.III/WP.51	Volume XXXVII: 2006	Part two, IV, D
A/CN.9/WG.III/WP.52	Volume XXXVII: 2006	Part two, IV, E
A/CN.9/WG.III/WP.53	Volume XXXVII: 2006	Part two, IV, F
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A/CN.9/WG.III/WP.55	Volume XXXVII: 2006	Part two, IV, H
A/CN.9/WG.III/WP.56	Volume XXXVII: 2006	Part two, IV, I
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A/CN.9/WG.III/WP.61	Volume XXXVII: 2006	Part two, IV, N
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A/CN.9/WG.III/WP.69	Volume XXXVII: 2006	Part two, IV, V
A/CN.9/WG.III/WP.70	Volume XXXVII: 2006	Part two, IV, V
A/CN.9/WG.III/WP.72	Volume XXXVIII: 2007	Part two, IV, B
A/CN.9/WG.III/WP.73	Volume XXXVIII: 2007	Part two, IV, C
A/CN.9/WG.III/WP.74	Volume XXXVIII: 2007	Part two, IV, D
A/CN.9/WG.III/WP.75	Volume XXXVIII: 2007	Part two, IV, E
A/CN.9/WG.III/WP.76	Volume XXXVIII: 2007	Part two, IV, F
A/CN.9/WG.III/WP.77	Volume XXXVIII: 2007	Part two, IV, G
A/CN.9/WG.III/WP.78	Volume XXXVIII: 2007	Part two, IV, H
A/CN.9/WG.III/WP.79	Volume XXXVIII: 2007	Part two, IV, I
A/CN.9/WG.III/WP.81	Volume XXXVIII: 2007	Part two, IV, K
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A/CN.9/WG.III/WP.83	Volume XXXVIII: 2007	Part two, IV, M
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A/CN.9/WG.III/WP.93	Volume XXXIX: 2008	Part two, I, B
A/CN.9/WG.III/WP.94	Volume XXXIX: 2008	Part two, I, C
A/CN.9/WG.III/WP.95	Volume XXXIX: 2008	Part two, I, D
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A/CN.9/WG.III/WP.97	Volume XXXIX: 2008	Part two, I, F

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A/CN.9/WG.III/WP.98	Volume XXXIX: 2008	Part two, I, G
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A/CN.9/WG.III/WP.101	Volume XXXIX: 2008	Part two, I, J
A/CN.9/WG.III/WP.102	Volume XXXIX: 2008	Part two, I, K
A/CN.9/WG.III/WP.103	Volume XXXIX: 2008	Part two, I, L
<i>(iii) Online Dispute Resolution</i>		
A/CN.9/WG.III/WP.105 and Corr.1	Volume XLII: 2011	Part two, V, B
A/CN.9/WG.III/WP.107	Volume XLII: 2011	Part two, V, D
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A/CN.9/WG.III/WP.112 and Add.1	Volume XLIII: 2012	Part two, IV, E
A/CN.9/WG.III/WP.113	Volume XLIII: 2012	Part two, IV, F
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A/CN.9/WG.III/WP.117 and Add.1	Volume XLIV: 2013	Part two, III, A
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A/CN.9/WG.III/WP.121	Volume XLIV: 2013	Part two, III, F
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<i>(i) International Negotiable Instruments</i>		
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### 7. Summary Records of discussions in the Commission

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