

**Submission from the representative of Japan**  
**to the thirty-fifth session of Working Group I**

**COMMENTS OF THE JAPANESE DELEGATION TO A/CN.9/WG.I/WP.122**

This delegation appreciates the work of the Secretariat for preparing this working paper. We respectfully submit our comments to WP.122 as follows.

A. Left-behinds from our previous comments

We would like to reiterate some of our comments to WP.118, namely paragraphs 2, 3, 4, 5, 7, 8 and 17 of A/CN.9/1009/Add.1, 3.B, which seem to have been neither accepted nor rejected at the 34<sup>th</sup> meeting of the Working Group.

B. New comments on the legislative guide

1. Paragraph 59

Letter (d) of Paragraph 59 refers to “criteria to resolve situations in which a decision cannot be reached” and gives a few examples of such criteria. We believe that the word “criteria” should be replaced with “measures” to better reflect the substance of the examples given.

2. Paragraph 79

For the sake of better clarity, we would suggest inserting “(see rec. 12 and 13)” at the end of the last sentence of the paragraph after the phrase “the approval by the members in their capacity as members”.

3. Recommendation 16

The current drafting states that “when the UNLLO is not managed by all of its members exclusively, one or more designated manager(s) *may* be appointed ...” (emphasis added). We believe that the word “may” should be substituted with “shall”.

4. Paragraph 89

We are satisfied with the clarification of the meaning of the term “manager” used in Rec.19 & 20 and Paragraphs 89 to 95. In this regards, we believe that Paragraphs 110 and 140, which also use the term “manager”, should be cited here as well.

5. Paragraph 114

We are afraid that the meaning of the term “assignment” used in the paragraph, in particular its difference with the term “transfer”, may not be that clear to some jurisdictions depending on their legal traditions. We appreciate if the Secretariat can use a more neutral terminology.

## 6. Paragraph 116

The last two sentences of the paragraph refer to the possibility of providing “the minority members with the right to exit the UNLLO under certain conditions” when “the deceased member held the majority of rights in the UNLLO”, as “it may be unusual for the law to require the consent of the minority members”. Although such a rule may be one of possible solutions, we believe that the Working Group has not discussed it yet and are not sure whether it is the best solution considering that the general principle for the transfer of rights of a member of an UNLLO is to grant the other members, including minority members, a veto right.

## 7. Paragraph 122

The paragraph gives examples of situations in which there is a reasonable cause for withdrawal, which is much appreciated. However, we are afraid that the example given in the brackets to letter (b), i.e. “not to distribute profits for five consecutive years where the UNLLO has been profitable”, might be too specific. We would suggest replacing the word “five” with “some” to avoid giving the impressions that the number is definitive.

## 8. Rec. 32 and footnote 123

In our view, the current drafting of the Rec.32 clarifies the scope of the application of alternative dispute resolution mechanisms adopted by members better than the Secretariat’s suggestion. If the Working Group wishes to incorporate the suggestion by the Secretariat, we would suggest adding the phrase “concerning the governance and operation of the UNLLO” at the end of the

current drafting of the Rec.32. Also, the Working Group might wish to clarify that disputes arising between designated managers and the UNLLO shall be also covered by ADR adopted by the members.

## C. New comments on the model organization rules

### 1. Article 2.a, first tick-box

We believe that the first tick-box in Article 2.a, stating “Equal rights (i.e. each member has one vote)”, is incorrect since the equality principle applies not only to voting rights but also to rights to receive distribution from the UNLLO as dividends or upon its dissolution. We would suggest simply deleting the parentheses, as the list of members’ rights is given in Article 3.a and need not be repeated here.

### 2. Article 2.a, second tick-box

Article 2.a provides an alternative standard to the equality principle for distributing rights to members, that each member of an UNLLO shall have “rights determined in accordance with

the value of its contributions”. We recall that, at the 28<sup>th</sup> meeting of the Working Group when we had a discussion on the standards of distributing rights to members, there was a suggestion that “relying on a member’s contribution to assess distributions and other rights could be unfair for those that made no contribution or for members that joined the UNLLO at different times and whose proportionate contribution might thus be valued differently” (see A/CN.9/900, para.157) and “there was support for the suggestion that it might be clearer for recommendation 13 to refer to the percentage or ratio of a member’s ownership to assess its rights of control, rather

than referring to the proportion of the member’s contribution” (ibid., para.158). While the drafting of the relevant recommendation has been changed from then, we believe that the arguments above are still valid. Therefore, we would propose to add another alternative to 2.a along the lines of the following:

“  Rights determined in accordance with the ratio set as follows.”

Member Name	Ratio of rights

### 3. Article 3.a

By providing tick boxes, Article 3.a allows an UNLLO to choose whether or not to grant its members rights to participate in decision-making (Rec.12 and 13), rights to receive distributions (Rec.22), to inspect and copy the records of and to obtain information from the UNLLO (Rec.31), and to withdraw from the UNLLO upon a reasonable cause (Rec.26). In our view, however, these rights are mandatory and should not be made optional.

### 4. Article 4.b

Letter (ii) lists “Time period within which the withdrawing member must be paid the fair value of their rights in the Organization” as one of items to be decided by a majority (or a qualified majority) of members. However, according to Recommendation 26 (b), it requires an agreement in the organizational rules to shorten or lengthen such time period fixed by the law. As such, this issue is already covered by Letter (i) of Article 4.a. Therefore, we propose to delete Letter (ii) of Article 4.b.

### 5. Article 5.d

Article 5.d allows an UNLLO to choose whether or not to impose on its members fiduciary duties the UNLLO by letting the UNLLO not to tick the first box. In our view, however, while fiduciary duties to other members (the second box) are optional (para.96), duties of care and loyalty of a person who manage the UNLLO to the UNLLO are mandatory rules and should not be made optional. Having said that, it should be up to the UNLLO to specify prohibited actions and permitted actions in the Organization Rules. We propose to redraft Article 5.d to be in line with the above.